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ARTICLES

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NOTICE PROVISIONS FOR UNITED STATES CITIZEN CONTRACTOR EMPLOYEES SERVING WITH THE ARMED FORCES OF THE UNITED STATES IN THE FIELD: TIME TO REFLECT THEIR ASSIMILATED STATUS IN GOVERNMENT CONTRACTS?

MAJOR BRIAN H. BRADY*

Over the past two decades, the Armed Forces of the United States have reduced their combat service support capabilities. As a result, government contractors now perform military logistics functions in the field. Increasingly, commanders must plan for deployment of contractor employees in the field. Unfortunately few commanders and few contractors understand their rights and obligations. The author proposes to amend the Defense Federal Acquisition

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Regulation Supplement (DFARS) *to give contractors notice of the rights and obligations of their employees in the field. The author's position is that government contractor employees hold military status in the field. Therefore, the Armed Forces of the United States must accord contractor employees similar rights and privileges to those afforded to government employees and military personnel who deploy in support of a military mission. In this way, commanders will integrate civilian contractor employees into the total force projection team in the field.*

I. Introduction

A. General

International law recognizes that United States citizen contractor employees serving with the Armed Forces of the United States in the field have military status.[1] These employees also assimilate to the Armed Forces of the United States by operation of modern contract requirements and United States domestic law.[2] Unfortunately, government contract clauses do not clearly define this status.[3] Consequently, neither the government's representatives nor government contractors understand their rights and obligations under government contracts in the field.[4]

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[1] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(4), 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135 (entered into force Feb. 2, 1956) [hereinafter GPW-491 (stating that civilian contractors accompanying the armed forces become prisoners of war when captured by enemy forces); **see** *also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 515 (Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY] (discussing the notion of quasi-military status and whether civilians serving the armed forces fall under the definition of combatants):

> [A]ny concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of the hostilities.

***See,** *e.g.*, Active Duty Service For Civilian or Contractual Groups, 32 C.F.R. § 47.4(b)(1)(iii)(A)(3).

[3] *See, e.g.*, GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.237-1 (1 Apr. 1984) [hereinafter FAR] (imposing a general duty on government contractors to familiarize themselves with site conditions, yet making no distinctions for combat conditions. "Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance . . . .").

[4] *See* THE DESERT STORM ASSESSMENT TEAM, REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, § III.F, Labor and Employment Law (22 Apr. 1992) [hereinafter DSAT REPORT] (on file with the Center for Law And Military Operations, The

Additionally, the trend of United States military logistics doctrine is to rely on greater contractor support in the field.[5] Likewise, United States government contract clauses fail to reflect this doctrinal trend.[6] Consequently, government contractors do not fully appreciate the rights and obligations of their employees who serve with the Armed Forces of the United States in the field.[7]

This article examines British and United States Armed Forces practices that illustrate the concept of assimilation. It illustrates the types of services that assimilated civilian contractors have historically provided to the military. The historical relationship between contractor employees and the armed forces demonstrates that contractor employees hold military status in the field.

Judge Advocate General's School, United States Army, Charlottesville, Virginia) (observing that both the armed forces and civilians lacked notice of their rights and obligations; note that the Desert Storm Assessment Team (DSAT) made no parallel findings under §III.E, Contract Law—the DSAT referred the problem of civilians to the labor and employment law arena). The DSAT found the following:

> a. Civilian employee[s] accompanying the force are, of course legitimate targets of enemy attack. Additionally, they are subject to capture by the enemy and the resulting POW status . . . For protection, civilian employees needed uniforms, equipment, and, according to some, sidearms (citation omitted). DOD Directives and Service Regulations provided little guidance to commanders . . . .
>
> . . . .
>
> b. Some civilian employees . . . were confused about their status under the law of war. This confusion existed even though the employees wore desert camouflage uniforms and had protective gear and weapons (citation omitted).

Id.

[5] See Leon E. Salomon, *Power Projection Logistics*, ***ARMY,*** Oct. 1993, at 162, 171, where the Army's Deputy Chief of Staff for Logistics describes the future of Army logistics capabilities:

> We continue to look to commercial sources such as the logistics civil augmentation program (LOGCAP) to support the warfighting effort. LOGCAP obtains civilian contractual assistance during peacetime to meet U.S. Army wartime (or crisis) logistical support requirements through advanced identification and planned acquisition of global corporate assets.

[6] *See, e.g.*, DEP'T OF ***ARMY***, FIELD MANUAL 100-5, OPERATIONS, 2-2 (14 June 1993) [hereinafter FM 100-51 (pronouncing Army doctrine, as yet not implemented in the *Federal Acquisition Regulation (FAR),* that civilians *form* part of the total force). "To meet future missions with a smaller force, the US Army conducts operations as a total force of the active component, reserve components, and civilians acting in concert with other services and allies."

[7] *See* Memorandum (with information paper) from Don Fuqua, Aerospace Industries Ass'n of America, to George E. Dausman, Deputy Assistant Secretary of the Army for Procurement, 5 (Nov. 10, 1991) [hereinafter AIA Memo] (on file with the author and Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon). "The Army should clearly define the conditions the contractors should expect to encounter and the services they can reasonably expect." *Id.*

This article also reviews emerging government policies and doctrine concerning United States citizen contractor employees in the field and demonstrates how the government has institutionalized the concept of assimilation. This article further analyzes United States government practice, in light of Schumacher *v. Aldridge*[8] and explains that current practice may not only assimilate contractor employees to the United States Armed Forces, but also may vest them with veteran status.[9]

The purpose of this article is to propose amendments to the *DFARS* (contained at the Appendix) that clarify the rights and obligations of contractor employees in the field. This article articulates the historical, doctrinal, and legal bases justifying these amendments. It also traces the many indicia of assimilation which show that contractor employees serving with the Armed Forces of the United States in the field unquestionably possess military status.

Finally, this article analyzes the merits of proposed *DFARS* notice provisions and explains why immediate consideration and implementation of these provisions by the Defense Acquisition Regulatory (DAR) Council is essential. This article also analyzes the proposed *DFARS* notice provisions under criteria established by the DAR Council,[10] and discusses cost-benefits, rule-making impacts, and policy considerations to demonstrate that the *DFARS* amendments are essential to force projection doctrine.

B. Definitions

This subpart will articulate key definitions underlying the concept of assimilation to the armed forces. These definitions are derived from many sources for the purposes of clarifying terms used in this article. This article contends that civilians may only assimilate to the armed forces if (1) they accompany the armed forces; (2) they serve with the armed forces; and (3) they serve in the field.

1. Assimilation *to* the Armed Forces — Assimilation is the de facto and de jure status of contractor employees serving with the Armed Forces of the United States in the field.[11] The term reflects military status granted to United States citizen contractor employees by operation of either international law,[12] or domestic United

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[8] 665 F. Supp. 41 (D.D.C.1987).

[9] *See* 32 C.F.R. pt. 47.

[10] *See* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 201.201-1 (2 June 1993) [hereinafter DFARS].

[11] *See* PROTOCOL COMMENTARY, *supra* note 1, at 515.

[12] *See, e.g.*, GPW-49, *supra* note 1, art. 4A(4), 6 U.S.T. at 3320 (concerning prisoner of war status attaching to contractor personnel who fall under the control of enemy forces).

States law,[13] or administrative rule-making authority.[14] Contractor employees assimilate to the Armed Forces of the United States under the following conditions:

> **(1)** They perform incident to government contract requiring their services;[15]
>
> **(2)** The government requires performance in the field or on a contingency operation where the conditions expose employees to loss of life or limb as a result of hostile enemy activity;[16] and
>
> **(3)** The government integrates contractor employees into the Armed Forces of the United States through unique actions including official accreditation, issuance of uniforms and equipment, and predeployment training, as a result of domestic law, agency policy, or international law.[17] As a result, these employees not only accompany the armed forces but serve with the armed forces in a direct military capacity.

2. Accompanying the Armed Forces—This term is inclusive of all civilians whose presence is occasioned by some connection to the armed forces. They may depend on the armed forces for their employment, life support, or sustenance. The term is illustrated by three groups of civilians that have historically accompanied the armed forces: the camp follower; the retainer-to-the camp; and the sutler.[18] The term does not mean that a civilian has assimilated to the force. A contractor employee must accompany the armed forces as a precondition to assimilation.

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[13] *See* G.I. Bill Improvement Act of 1977 § 401, Pub. L. No. 95-202, 91 Stat. 1433, 1449 (amending **38** U.S.C. § 106) [hereinafter G.I. Bill Improvement Act].

[14] *See, e.g.*, **32** C.F.R. pt. 47.

[15] *See id.* § 47.4(a)(2).

[16] *See id.* §§ 47.4(a)(3); (b)(1).

[17] *See id.* § 47.4(b)(3), citing criteria for determining veteran status for contractor employees who accompanied the armed forces during armed conflict, as follows:

> [Clonsideration will be given to whether members of the group were regarded and treated as civilians, or *assimilated to the Armed Forces* as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice.

(emphasis added).

[18] *See generally* FREDERICK B. WIENER, CIVILIANS UNDER MILITARY JUSTICE SINCE 1689, 7 (1967). The author describes the classes of civilians accompanying the British armed forces in the field as follows:

> Three classes are principally in question. The first of these were the *retainers to the camp:* officers' servants; volunteers, i.e. young gentlemen awaiting commissions; and women and children . . . . The second group consisted of the sutlers, precursors of NAAFI [the British Navy And Air Force Institution *is—not* to be confused with the American NAFI—the equivalent of the American post exchange and club system] . . . .

In the context of a combat deployment, the term traditionally describes individuals "who accompany the armed forces without actually being members thereof," located in the field or on contingency operations.[19] However, the term includes contractor employees who assimilate to the United States Armed Forces, during peacetime, as members of the "civilian component" under treaty.[20] For example, the terms of the Supplementary Agreement to the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) assimilates "technical experts" (contractor employees) to the "civilian component" (civil service) of the Armed Forces of the United States.[21]

For the purposes of this article, the definition includes all United States citizens who perform services on behalf of the Armed Forces of the United States, identified under terms of Articles 4(A)(4) and (5) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (PW Convention of 1949).[22] The article shows that, in some instances, contractor employees may no longer fall in the strict definition of Articles 4(A)(4) and (5) but may become classified as auxiliaries or volunteers within the meaning of Articles 4(A)(1)-(3)

> The third group comprised the civil departments of the Army as well as the civil officers and civilian employees of the military portions of the Army.

Id. (emphasis added).

[19] *See* GPW-49, supra note 1, art. 4A(4), 6 U.S.T. at 3320.

[20] *See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. I(1)(b), 4 U.S.T. 1792, 1794, 199 U.N.T.S. 67 [entered into force Aug. 23, 1953] [hereinafter NATO SOFA]. This agreement defines civilian component to include contractors:

> (b) "civilian component" means the civilian personnel accompanying the force of a Contracting Party who are in the employ of an armed seruice of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.

Id. (emphasis added)

[21] *See* Agreement to Supplement the Agreement of June 19, 1951, between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces With Respect to Foreign Forces stationed in the Federal Republic of Germany, with Protocol of Signature, Aug. 3, 1959, art. 73, 14 U.S.T. 531, 623, 481 U.N.T.S. 262 (entered into force July 1, 1963) [hereinafter Supplementary Agreement to the NATO SOFA]. This agreement defines technical experts as part of the civilian component deployed with NATO forces in Germany:

> Technical experts whose services are required by a force and who in the Federal territory exclusively serve that force either in an advisory capacity in technical matters or for the setting up, operation or maintenance of equipment shall be considered to be, and treated as, members of the civilian component.

Id. (emphasis added).

[22] *See* GPW-49, supra note 1, 6 U.S.T. at 3320.

of the PW Convention.[23] In this article, United States citizen contractor employees not only accompany the armed forces in the field, but serve with these forces, pursuant to government contract.

3. Contingency Operation—This term envisions all military missions short of congressionally declared war. Contractor employees will deploy in support of the Armed Forces of the United States during contingency operations.[24] This article adopts the statutory definition, as codified in Title 10 United States Code (U.S.C.) § 101(13).[25] For the purposes of the article, reference to service "in the field" includes service on contingency operations.

4. Contractor Employee—This term refers to all United States citizen civilian contractor employees who perform services exclusively for the United States government incident to a government contract "in the field."[26] Although the term excludes all government employees—such as civil service employees—it includes contractors assimilated to the "civilian component" by operation of domestic law or treaty.[27] The term includes employees serving under contract with the United States pursuant to circumstances delineated by Article 4(A)(4) and (5) of the PW Convention of 1949.[28]

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[23] *See* ***id.*** 4(A)(1)-(3), ***6*** U.S.T. at 3320; ***see also*** PROTOCOL COMMENTARY, ***supra*** note **1,** at **515.**

[24] *See* Anthony H. Kral, ***Need For External Support: Don't Try Fighting Without It!,*** ***ARMY*** LOGISTICIAN, Jan.-Feb. 1993, at **29** (citing the Army's experience with host nation support and contracted support in Europe and Southwest Asia). "In the future, the Army will find it difficult, if not impossible, to fight without external support. In essence, wartime host-nation support and contingency contracting have become operational necessities."

[25] *See* 10 U.S.C. § 101(a)(13), Definition of Contingency Operation, which defines the term as follows:

> The term "contingency operation" means a military operation that—(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call to, or retention on, active duty of members of the uniformed services under sections [12301, 12302, 123041, 673c, 688, [12406] of this title, chapter 15 of this title, or any other provision of law during a war or during **a** national emergency declared by the President or Congress.

Cf. 10 U.S.C. § 127a, Expenses for Contingency Operations (outlining the funding mechanism for National Contingency Operations).

[26] *See* ***generally*** 32 C.F.R. §47.4(a)(2) (discussing contractor employee eligibility for veteran benefits) ("rendered service to the United States . . . as a result of a contract with the U.S. Government to provide direct support to the U.S. Armed Forces").

[27] *See* Supplementary Agreement to the NATO SOFA, art. 73, ***supra*** note 21, 14 U.S.T. at 623.

[28] *See* GPW-49, ***supra*** note **1,** arts. 4A(4), (5), ***6*** U.S.T. at 3320 (referring to whom prisoner of war status accrues on capture during international armed conflict):

> (4) Persons who accompany the armed forces without being members thereof, such as civilian members of military aircraft crews, war corre-

The term "contractor employee" incorporates all manifestations of contractor employees serving in the field under government contract and doctrine. The term includes Field Service Representatives (FSR), as defined under the *FAR*,[29] the *DFARS*,[30] and service supplements.[31] The term includes employees of Contractor Plant Services (CPS), Contractor Field Services (CFS), and FSRs employed under the Army's Logistics Assistance Program.[32] The term includes contractor employees executing the Army's Logistics Civil Augmentation Program (LOGCAP).[33] The term also includes individuals who pro-

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spondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces . . . .

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft . . . .

[29] *See* FAR, *supra* note 3, 37.203(d), defining technical representatives as follows:

> *Engineering and technical service.* Engineering and technical services (technical representatives) take the form of advice, training, or, *under unusual circumstances,* direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software. All engineering and technical services provided prior to final Government acceptance of a complete hardware system are part of the normal development, production, and procurement processes and do not fall in this category. Engineering and technical services provided after final Government acceptance of a complete hardware system are in this category except where they are procured to increase the original design performance capabilities of existing or new systems or where they are *integral to the operational support of a deployed system and have been formally reviewed and approved in the acquisition planning process.*

(emphasis added).

[30] *See* DFARS, *supra* note 10, 237.203(d)(i), defining field service representatives as follows:

> Engineering and technical services consist of. . .
>
> (C) Field Service Representatives, which are employees of a manufacturer of military equipment or components who provide a liaison or advisory service between their company and the military users of their company's equipment or components.

[31] *See, e.g.,* DEP'T OF ARMY FEDERAL ACQUISITION REG. SUPP. 37.7001(90), (91) (10 May 1993) [hereinafter AFARS], defining field service engineers for the Army as follows:

> (90) *Contract Field Service (CFS) Engineering.* A CFS engineer is a contractor employee who has detailed knowledge of the function, design, or fabrication of military equipment, systems, or components. His services are required to perform analyses so as to advise the using activity on obtaining the most efficient use of a system or component . . . .
>
> (91) *Contract Field Service (CFS) Technician.* A CFS technician is a contractor employee who provides on-the-job training to Department of the Army personnel in the installation, operation, and maintenance of a system, equipment, or components. . . .

[32] *See* DEP'T OF ARMY, REG. 700-4, LOGISTICS ASSISTANCE PROGRAM (LAP), para. 5-2b (22 Apr. 1991) [hereinafter AR 700-4].

[33] *See* DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 1985) hereinafter *AR* 700-1371.

vide services under Department of Defense (DOD) Contracted Advisory Assistance Services (CAAS) procedures.[34]

The terminology anticipates that a casual observer may mistake the contractor employee for a government employee in the field. In most cases the contractor employee will have privity of contract with a private employer, not the government. However, some contractor personnel, such as advisors and experts, may have privity of contract with the government.[35] On deployment, all contractor employees appear, to the outsider, to be in privity of contract with the government owing to assimilation to the armed forces.[36]

5. In the Field—This term refers to localities of imminent danger, combat, or hostile fire as defined under Article **2,** Uniform Code of Military Justice (UCMJ).[37] For the purposes of this article, a congressionally declared war—"time of war"—need not exist to trigger use of the term. Thus, the term may include contingency operations.[38]

This term may include localities in the Continental United States where units prepare for deployment to combat.[39] The term envisages potential loss of life or limb, or grievous bodily injury as a result of prevailing circumstances.

6. Serving with the Armed Forces—The second requirement for civilian contractor employees to assimilate to the armed forces is that they "serve with" the armed forces. The term refers to an individual or group that is an integrated into the armed forces.[40] Thus, "technical experts" assimilated to the "civilian component" of the Armed Forces of the United States "serve with" the armed forces when they deploy to Germany.[41] The term deviates from the Geneva

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[34]*See* DEP'T OF DEFENSE DIR. 4205.2, ACQUIRING AND MANAGING CONTRACTED ADVISORY AND ASSISTANCE SERVICES (CAAS) (10 Feb. 1992) [hereinafter DOD DIR. 4205.21.

[35]*See* FAR, ***supra*** note 3, pt. 37.

[36]*See, e.g.,* Supplementary Agreement to the NATO SOFA, ***supra*** note 21, art. **73,** 14 U.S.T. at 623.

[37]*See* 10 U.S.C. § 802(a)(10) note 70 ("Field Defined"); ***see also*** Hines v. Mikell, 259 F. 28 (4th Cir. 1919), ***cert. denied,*** 250 U.S. **645,** (1919); ***Ex parte*** Jochen, 257 F. 200 (D.C. Tex. 1919); ***In re*** Di Bartolo, ***50*** F. Supp. 929 (D.C.N.Y. **1943).**

[38]*See* 10 U.S.C. § 101(13).

[39]Memorandum from E.H. Crowder [The Judge Advocate General] to The Judge Advocate, Port of Embarkation, Hoboken, N.J. (Apr. 3, 1918), ***reprinted in*** A SOURCE BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION, ***730*** (West Pub. CO., St. Paul, Minn. 1919) [hereinafter Crowder Memo].

[40]32 C.F.R. § 47.4(b)(1)(iii) (discussing criteria considered by the DOD Civilian/Military Service Review Board determining whether civilians are integrate to the Armed Forces). "Integrated civilian groups are subject to the regulations, standards, and control of the military command authority." *Id.*

[41]*See* Supplementary Agreement to the NATO SOFA, ***supra*** note 21, art. 73, 14 U.S.T. at 623.

Convention definition that limits those "serving with the armed forces" to groups of auxiliaries and other "combatant" forces.[42]

For the purposes of this article, contractor employees "serve with" the armed forces when they are "in the field," even though not subject to wartime UCMJ jurisdiction.43 Contractor employees who serve with the Armed Forces of the United States in the field may assimilate to the military. This article identifies the additional factors that indicate assimilation and the problems that this status has created necessitating changes in government contract clauses.

II. The Problem

A. *The Scenario*

The introduction set the definitional framework for this article. This section describes the context of the problem facing contractor employees in the field. Although this article cites examples of problems stemming from deployments to Southwest Asia, the issues remain the same in other regions and military operations.

Imagine an American technician working for a helicopter manufacturer that sold the United States Army attack helicopters in the early 1980s. His employer informs him that he is to accompany the Army to an imminent danger zone to fix the helicopters when they fail.[44]

Imagine his surprise when the Army issues him a uniform,[45] chemical protective gear,[46] and a "noncombatant" identity card.[47] His employer tells him, however, that he will have to obtain a regu-

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[42] *See* GPW-49, *supra* note 1, art. 4A(1)-(3), 6 U.S.T. at 3320.

[43] 32 C.F.R. § 47.4(1)(v) (citing criteria for awarding veterans benefits to contractor employees, under revised language adopted in 1989). "[Tlhose serving with the U.S. Armed Forces may have been treated as if they were military . . . ." *Id.*

[44] *See* DFARS, *supra* note 10, 237.203(d)(i)(C).

[45] AFARS, *supra* note 31, 37.7098-6, Uniforms (discussing circumstances of issue). "When contractor personnel are directed to wear uniforms or other special clothing . . . commanders may issue on a temporary loan basis from available inventories items of organizational field clothing and equipment and items of special clothing and equipment . . . ." *Id.* ***See also*** DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF *ARMY* UNIFORMS AND INSIGNIA, para. 29-10a (1 Sept. 1992) (authorizing commanders to issue uniforms to contractors). "U.S. civilian personnel attached to or authorized to *accompany forces* of the United States, including DA civilians are authorized to wear utility uniforms only when required in the performance of their duties and when authorized by the MACOM commander." *Id.* (emphasis added).

[46] *See* DEP'T OF ARMY, REG. 735-5, para. 2-5 (28 Feb. 1994) hereinafter AR 735-51.

[47] *See* DEP'T OF ARMY, REG. 600-8-14, IDENTIFICATION CARDS, TAGS, AND BADGES, para. 8-3b (15 July 1992). "The purpose of the DD Form 489 is for identification of civilian noncombatant personnel who have been authorized to accompany military forces of the United States in regions of combat and who are subject to capture and detention by the enemy as prisoners of war." *Id.*

lar passport and visa to enter the imminent danger zone.[48] Two weeks after the unit deploys, his regular passport and visa arrive: he notes that DOD civilians travelled on orders and an identification card.[49] The American technician takes a commercial flight, because the contracting officer and operations officer could not schedule him for a military flight.[50] Other colleagues in a competitor's firm flew on military aircraft but the Air Force bumped them from the flight in favor of cargo at a refueling stop en route.[51]

Once in the imminent danger zone, the guards at the Army unit keep turning the technician away from the work site, because he does not have the right kind of identity card.[52] His contract states that he has the privilege to use the commissary and Post Exchange (PX). However, the PX manager turns him out at the check out line, because an international agreement with the host nation prohibits contractors from using these military services.[53]

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[48] *See* 22 C.F.R. § 51.3(a), describing types of passports as follows:

> (a) ***Regular passport.*** A regular passport is issued to a national of the United States proceeding abroad for personal or business reasons.
>
> (b) ***Official passport.*** An official passport is issued to an official or employee of the U.S. Government proceeding abroad in the discharge of official duties . . . .

[49] *See* Message, Commander in Chief, United States Army Europe, AEUGA-M, subject: Passport/Visa Requirements for Desert Shield (170745z Aug 90) (copy on file with author; copy issued to author while serving at Headquarters, V Corps, Frankfurt, Germany) (detailing differences between DOD civilians and contractor personnel travelling to Saudi Arabia). "DOD civilians who travel by military aircraft do not require passports or visas . . . Civilian contractors who are sponsored by DOD will require passports and visas." *Id.*

[50] *See* DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (PUB. L. NO. 102-25), at 603 (1992) [hereinafter DOD TITLE V REPORT] (describing civilian support issues). "Civilians travelling to SWA via military aircraft were accorded a movement priority after military personnel." Id.

[51] *See* Schandelmeier, ***AMC Assists in Deployment,*** ***ARMY*** LOGISTICIAN, Mar.-Apr. 1992, at **34,** 36 (recounting deployment difficulties encountered by civilians flying on United States Air Force aircraft during Operation Desert Shield). "To add to the frustration, some deployers were bumped en route by higher priority passengers and cargo." Id.

[52] *See* DOD TITLE V REPORT, ***supra*** note 50, at 603 (describing problems with identification cards). "The absence of a standard civilian ID card resulted in different identification systems. This practice caused occasional problems at security checkpoints when the security guard, often a local national . . . failed to recognize the validity of the particular card." Id.

[53] *See, e.g.,* Agreement Relating to a United States Military Training Mission in Saudi Arabia, Feb. 8-27, 1977, Exchange of Notes, art. 9H, 28 U.S.T. 2409, 2412, [hereinafter USMTM Accords] (prohibiting contractors from using the commissary or post exchange operated by USMTM). "The U.S. Military Training Mission will be allowed to maintain food commissary stores and site supply stores for its members and U.S. government employees. Use of these facilities will not be accorded to any contractor of any nationality." Id.

The technician discovers that the unit he supports is to be located at a "LOGBASE"[54] only twenty-five kilometers from the "FLOT" (Forward Line Of Own Troops).[55] He remembers something from his Army days that civilians can only serve in the "rear" or "COMMZ"(Communications Zone).[56] The commander insists that it is alright and the technician anxiously travels with the unit to the LOGBASE. On arrival, the technician discovers that the armor and infantry are a two days road march to the rear of the LOGBASE.

The enemy conducts a raid and their infantry shoot at him. They capture the technician who had no means to resist.57 The field commander decided not to issue the technician a weapon because he thought that it would be too difficult to train him; and if armed, the technician would only have caused trouble like those civilian "crooks" in Vietnam.[58] Additionally, the field commander believed that if armed, the enemy would execute him as a guerrilla or mercenary.[59]

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[54]*See* WILLIAM G. PAGONIS & JEFFREY L. CRUIKSHANK, MOVING MOUNTAINS 124 (1992) (justifying Major General Pagonis's decision to locate logistics bases forward of combat forces during Operation Desert Shield). "If we didn't set up a logbase right up at the front, we might be looking at real problems down the road. . . . As far as I was concerned, the location was perfect for a large and relatively stable logbase." Id.

[55]*See* GEORGE B. DIBBLE, ET AL., LOGISTICS MANAGEMEST INSTITUTE, ARMY CONTRACTOR AND CIVILIAN MAINTESANCE, SUPPLY, AND TRANSPORTATION SUPPORT DURING OPERATIONS DESERT SHIELD AND DESERT STORM, 1 STUDY REPORT, G-6 (1993) [hereinafter LMI REPORT] (identifying the location of contractor personnel during Operation Desert Storm).

[56]*See AR* 700-137, supra note 33, para. 3-2d (outlining policy concerning use of contractor personnel in military operations) "(1) Normally, contractor personnel will not be used forward of the brigade support area . . . . (5) Contractors can be used only in selected combat support and combat service support activities. They may not be used in any role that would jeopardize their role as noncombatants." Id. But see DEP'T OF ARMY, REG. 750-1, ARMY MATERIEL MAINTENANCE POLICY AND RETAIL MAINTESANCE OPERATIONS, para. 4-23b (1 Aug. 1994) [hereinafter AR 750-11 (restricting the use of contract maintenance workers). Contractor maintenance personnel "will not be stationed permanently forward of the Corps rear boundary and . . . may travel forward of the Corps rear boundary on a case-by-case basis as individual equipment failures occur . . . ." *Id.*

[57]*See, e.g.,* Ann Devroy, *U.S.* Seeks Release *of* 2 Held in Iraq; Civilians Are Said to *Cross* Border by Mistake, WASH. POST, Mar. 18, 1995, at A19 (describing the dilemma faced by two United States civilians, serving on defense contract with Kuwait, who accidentally strayed into Iraq). "The United States is seeking the release of two American civilians being held by the Iraqi government after they inadvertently crossed the border. . . . The two are civilian employees of the U.S. aircraft manufacturer McDonnell Douglas, which has a contract with the Kuwaiti air force . . . ." Id.

[58]*See* E.A. GATES & GARY V. CASIDA, WARTIME LEGISLATION TEAM, REPORT TO THE JUDGE ADVOCATE GESERAL (Sept. 1993) [hereinafter WALT REPORT] (citing an anonymous general officer, who said, "In Vietnam, placing the civilian crooks in jail was the best weapon I had against those personnel.").

[59]*See* Vincent A. Transamo, *The* Birth *of* the Seabees, MIL. ENG., July 1992, at 76 (citing the popular—but legally questionable—raison d'etre for the creation of the Navy's Combat Battalions). "Civilians not only lacked the military training to defend themselves and what they were building but, under international law, they could be executed as guerrillas if caught bearing arms." Id.

Now the technician is shielding an oil refinery in enemy territory. He is accompanied by an Army Specialist and a Sergeant, young enough to be his children. The Sergeant asserts that because he is senior in rank, he will take charge of this group of prisoners of war,[60] and has a great escape plan. What if the armed forces went to war, but no contractors decided to come?

B. Overview

Modern field conditions subject civilian contractor employees to the dangers of international armed conflict.[61] International law has eroded many distinctions between civilian contractor employees and military personnel who serve in the field.[62] Unfortunately, United States government contract procedures do not adequately reflect the legal status — under both domestic and international law — of its contractor employees in the field.[63] As a consequence, both government and contractor personnel perceive inequities in their relative roles in the field.[64]

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[60] *See* Code of Conduct For Members of the Armed Forces, Exec. Order No. 12,633, 53 Fed. Reg. 10,355, art. IV (1988) [hereinafter Code of Conduct] (reciting the duty of the senior prisoner of war to take charge?. "If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way." *Id*.

[61] Michael S. Williams & Herman T. Palmer, ***Force-Projection Logistics,*** MIL. REV., June 1994, at 29, 31 (advocating increased use of civilians to support the Army in the field. "Some logistics support missions must shift to the Department of Defense (DOD) civilian component and the private sector . . . Private sector individuals and firms, providing essential logistics services will be present throughout the theater of operations." *Id*. ***See also*** DEPT' OF ARMY, ARMY FOCUS 94, FORCE XXI: AMERICA'S ***ARMY*** IN THE 21ST CENTURY, (1994) [hereinafter ARMY FOCUS] (citing the Army vision for the future?:

> Future battlefields will be different and more complex than 20th century battlefields. . . . Increases in lethality likely to emerge in the early part of the 21st century will so significantly change the complexion of the battlefield that . . . America's Army will be required to make major changes in tactics, organizations, doctrine, equipment, force mixes, and methods of command and control.

Id. at *11*.

[62] *See* PROTOCOL COMMENTARY, ***supra*** note **1**, at 506. "The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore [in light of Article 43(3), Protocol I to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War] no longer used." *Id*. ***See generally*** HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (59 International Law Studies, 1979).

[63] *See* AIA Memo, ***supra*** note 7, at **7** (recommending changes to contract procedures to remedy procurement deficiencies?. "[The statement of work should include industry responsibilities for contingency/mobilization. . . . Current contracts should be modified to include industry contingency requirements." *Id*.

[64] *Id.* at **5.** "Contractor personnel should be granted . . , the same type status provided to mission-essential civil service employees." *Id*.

Nevertheless, the government trend is to rely on civilian contractors to support its mission in the field.[65] This is not a new trend, however, and many myths persist concerning the status of civilian contractor employees in the field.[66] The problems associated with civilian contractor employees stem from ignorance of their legal status and the lack of doctrine to care for them in the field. The problems frustrate the total force concept, and prevent efficient force projection. Contractor employees serving with the Armed Forces of the United States serve the national interest: why then does the United States treat them as pariahs?

C. Issues in Perspective

1. Department of Defense Dilemmas — The DOD Report to Congress concerning Operations Desert Shield and Storm demonstrate that the DOD has deliberately abandoned core capability in support functions in favor of combat strength.[67] The DOD's increasing reliance on civilian contractors reveals disturbing gaps in logistical planning.[68] Unless the DOD informs civilian employees about their legal status in the field, few civilians will perform armed forces contracts as originally bargained.

The DOD Inspector General (IG) found that the military does not provide adequate guidance to contractors deploying in support of contingencies.69 Compounding the lack of guidance, the DOD IG

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[65]*See* LMI REPORT, *supra* note **55,** at G-6. "In the future, as we fight 'come as you are' wars with an uncertain industrial base and high-tech weapon systems, greater use of contractors and DACs [Department of the Army Civilians] will be required."*Id.*

[66]*Id.* at 2-7.

[67]*See* DOD TITLE V REPORT, *supra* note 50, at 600, discussing DOD's policy assigning combat support roles to the civilian sector as follows:

> Civilians employed in direct support of Operations Desert Shield and Desert Storm were there because the capability they represented was not sufficiently available in the uniformed military or because the capability had been consciously assigned to the civilian component to conserve military manpower. It seems clear that future contingencies also will require the presence and involvement of civilians in active theaters of operations.

[68]*See* Memorandum from John D. Caviggia to Deputy Assistant Secretary of the Army for Logistics et al., subject: Minutes of Council of Colonels, **23** Feb 94, for Civilians Deployed to Support Army Operations (3 Mar. 1994) (recommending extensive revisions to Army policy, regulation, and doctrine concerning deployment of civilians in the field) (copy on file with the author and Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon).

[69]DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES, AUDIT REPORT NO. 91-105, at 10 (26 June 1991) [hereinafter DOD IG REPORT 91-1051 (recommending changes to DOD Directive 3020.37 by "[requiring] provisions to safeguard contractor personnel performing emergency-essential services during a crisis or hostile situation.)"*Id.*

also found that the government lacks adequate enforcement mechanisms to ensure contractor performance during times of crisis.[70] Despite the DOD's promulgation of DOD Instruction 3020.37,[71] and DOD Directive 1404.10,[72] the DOD has not implemented contract clauses to enforce its policy. In 1994, the DAR Council rescinded proposed *DFARS* amendments that would have implemented DOD Instruction 3020.37.[73]

The Armed Forces of the United States response to the DOD IG report stated that "[tlhe commander is charged by the Geneva Conventions with protecting the lives of all noncombatants."[74] Notwithstanding commanders' good will, nothing in government doctrine or contract "afford[s] contractor employees with similar priorities, rights, and privileges accorded to DOD emergency-essential civilians . . . ."[75] This is an inequity that causes needless conflict between government and the private sector.[76]

2. Private Sector Perspectives—In 1993, the Logistics Management Institute (LMI), reported its findings and recommendations concerning Department of the Army and civilian contractor employee support in the field during Operations Desert Shield and Storm.[77]

The LMI found that few contractors served with the armed forces in direct combat,[78] although all served in a Presidentially

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[70] *Id.* at 3 (citing DOD IG Report 89-026 (7 Nov. 1988)).

[71] DEP'T OF DEFENSE INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES (6 Nov. 1990) [hereinafter DOD INSTR. 3020.371.

[72] DEP'T OF DEFENSE DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES (10 Apr. 1992) [hereinafter DOD DIR. 1404.101.

[73] *See* DFARS Withdrawal of Proposal, 59 Fed. Reg. 40,005 (1994) [hereinafter DFARS Withdrawn Proposal] (citing the DAR Council rationale for withdrawing clauses implementing DOD Instruction 3020.37). "Existing FAR and DFARS clauses adequately address the Government's rights to terminate a contract and the contractor's duty to perform." *Id.*

[74] DOD IG REPORT 91-105, supra note 69, at 19 (citing Memorandum from Christopher Jenn to [DOD IG], subject: Draft Audit Report on Civilian Contractor Overseas Support During Hostilities (Project No. ORA-0019) (20 May 1991).

[75] *Id.* at 12.

[76] *See* AIA Memo, *supra* note 7, at 5, recommending that the government give the same treatment to contractors as civil service employees:

> Contractor personnel should be granted official government travel status so that they can move to and throughout the theater without needing visas and other approvals normally required of U.S. citizens (i.e. the same type status provided to mission-essential civil service employees). Other services could include industry access to Government processing of orders, passports/visas, identification cards, medical immunizations, provision of any special training/equipment, messing, billeting, and in-theater clearances.

Id.

[77] LMI REPORT, *supra* note 55.

[78] *Id.* at 2-5, discussing numbers of contractors who crossed into Kuwait or Iraq during the Ground Campaign:

declared combat zone.[79] The vast majority of contractor employees served in "rear areas."[80] In some instances, the military had no choice but to use contractor services.[81] As a result, the LMI determined that the Army must improve its guidance concerning contractors in the field.[82] Unfortunately, the LMI report does not present recommendations for contractual solutions to the problem.

The study highlights gaps in doctrine concerning deployment of civilian contractor employees.[83] Although DOD directives, service regulations, and field manuals help define responsibilities, the military has not finalized details how civilian contractors should deploy in the field.[84] Currently, the government provides details to contractors via standard government contract clauses.[85] The time has come for the DOD to articulate its superior knowledge about service in the field and place contractors on notice of site conditions.

The private sector wants the Armed Forces of the United States to accord contractor employees similar treatment as government

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> We identified **34** personnel [of 998 contractor employees in theater] who accompanied units into Iraq and Kuwait during the ground war. This represents less than **1** percent of all contractor and DAC personnel who were serving at the time. . . . Their average stay was 90 hours. . . . We identified no foreign contractors who accompanied units into Kuwait or Iraq.

Id.

[79] *See* Designation of Arabian Peninsular Areas, Airspace, and Adjacent Waters as a Combat Zone, Exec. Order No. **12,744, 56** Fed. Reg. **2663** (1991) [hereinafter Combat Zone Order].

[80] LMI REPORT, *supra* note **55,** at iii (discussing the location of the majority of contractor employees). "Although some contractors performed their work with the Corps and Division support organizations, about 80 percent of them operated in the rear areas. . . . Personnel were routinely deployed on a temporary basis from both the rear areas and military unit locations to sites requiring assistance." *Id.*

[81] *See id.* at **G-3,** summing up the importance of contractors as follows:

> Contractors performed an essential and vital role in the theater. Given the downsizing of the Military Services, the fact that a number of systems were fully contractor supported [e.g., mobile subscriber equipment (MSE)], and the nonavailability of trained military technicians with all the skills to accommodate all the maintenance requirements, there was no viable option other than to use contractors to supplement the "green-suit" maintenance.

[82] *Id.* at G-4 (recommending better policy concerning contractor employees in the field). "The consensus of most of the respondents was that there is a role for contractors and DACs on the battlefield, but it is mostly at echelons above corps. That role needs to be more fully defined in applicable Army policy and procedure." *Id.*

[83] *Id.*

[84] *See* Draft, The Army Mobilization and Operations Planning and Execution System (AMOPES), Tab H (Contractor Personnel) to Appendix **3** (Civilian Personnel) to Annex E (Personnel) (undated draft obtained by author in January 1995; original on file with Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon) bereinafter Tab H, App. 3, Annex E, AMOPES].

[85] *See* FAR, *supra* note **3,** 52.237-1.

employees.[86] Conscious that the military must maintain its own core capabilities, the private sector also suggests that its employees serve as a supplementary, and not as a replacement, force.[87]

3. Legislative Branch Perspectives—General Accounting Office (GAO) studies raise three issues concerning contractor employees: **(1)** whether the Army is prepared to receive and support civilians in the field;[88] **(2)** whether civilian contractor employees are performing inherently governmental functions;[89] and **(3)** whether contracting officers are properly negotiating Contracted Advisory Assistance Services (CAAS) which require deployment of civilian contractor employees in the field.[90]

The GAO studied Army maintenance during Operations Desert Shield and Storm. The GAO concluded that the Army does not adequately plan for contractor services in the field.[91] Confirming

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[86] *See* AIA Memo, *supra* note 7, at 5, recommending that the government treat contractor employees like civil service employees:

> The Government should assume responsibility for critical personnel actions for contractor personnel who will be deployed to the theater of operation. Contractor personnel should be granted official government travel status so that they can move to and throughout the theater without needing visas and other approvals normally required of U.S. citizens (i.e. the same type status provided to mission-essential civil service employees). Other services could include industry access to Government processing of orders, passports/visas, identification cards, medical immunizations, provision of any special training/equipment, messing, billeting, and in-theater clearances.

Id.

[87] LMI REPORT, *supra* note 55, at G-6, concluding that civilian contractor employees are a valuable asset to the armed forces:

> We believe that contractors should be a supplement to the logistics force structure, used judiciously where applicable, but should not be a replacement force. The Army must come to grips (doctrinally) with the role that it wants its contractors to play; then it must develop supporting policy and procedures. As one interview respondent mused, "After all, would you hire out your infantry"?

Id.

[88] GENERAL ACCOUNTING OFFICE, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIV., B-251383, ARMY MAINTENANCE (29 Apr. 1993) [hereinafter GAO REPORT B-2513831.

[89] *See* GENERAL ACCOUNTING OFFICE, GENERAL GOVERNMENT DIV., B-241388, GOVERNMENT CONTRACTORS: ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? (18 Nov. 1991) [hereinafter GAO REPORT B-2413881.

[90] GENERAL ACCOUNTING OFFICE, GENERAL GOVERNMENT DIV., B-256459, GOVERNMENT CONTRACTORS: MEASURING COSTS OF SERVICE CONTRACTORS VERSUS FEDERAL EMPLOYEES (10 Mar. 1994) [hereinafter GAO REPORT B-2564591.

[91] GAO REPORT B-251383, *supra* note 88, at 3, reciting Army deficiencies concerning use of civilian maintenance:

> [The] Army's strategy for accomplishing its wartime maintenance mission . . . is inconsistent with actual wartime maintenance practices . . . the wartime strategy does not consider the use of civilians . . . this inconsistency has led to an ineffective wartime GS [General Support] maintenance strategy that exists today.

Id.

this view in 1993, the Office of Management and Budget (OMB) surveyed federal service contracting and concluded that government reliance on contracted services results from shrinking government employment.92 Although no serious problems exist, CAAS procedures burden government procurement.93

Nevertheless, the GAO issues are problematical. Although the ***FAR*** exempts service contracts from proscriptions against personal service contracts,[94] deployed contractor employees — wearing uniforms and using government life support — may look like government employees.95 The nature of service in the field — imposing weapons training, uniform policies, and restrictions on liberty — appear to have little to do with the basic service contract and could violate proscriptions against personal service contracts.96

4. Judicial Branch Perspectives — In 1987, Schumacher v. Aldridge, a controversial decision of the United States District Court for the District of Columbia, paved the way for members of the Merchant Marine to claim veteran status.[97] Schumacher articu-

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[92]*See Summary Report of Agencies' Service Contracting Practices, 61* Fed. Cont. Rep. (BNA) *58* (Jan. 17, 1994) [hereinafter OMB Report], reporting the January 13. 1994 OMB findings concerning seventeen federal agencies, and finding as follows:

> Government reliance on contracted services is increasing and many agencies are being required to do more with less staff.
>
> Agencies often assume that additional government personnel will not be authorized and therefore, there is no alternative but to contract for needed services.
>
> . . . .
>
> The statements-of-work used to describe the specific tasks or services to be procured by contract are frequently so broad and imprecise that vendors are unable to determine the agency's requirements . . . .

[93]*Id.*

[94]*See* FAR, *supra* note 3, 37.101, describing service contracts as follows:

> Some of the areas in which service contracts are found include the following:
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> (a) Maintenance, overhaul, repair, servicing, rehabilitation, salvage. modernization, or modification of supplies, systems, or equipment.
>
> . . . .
>
> (d) Advisory and assistance services.
>
> (e) Operation of Government-owned equipment, facilities, and systems.
>
> (g) Architect-Engineering . . . .

[95]*See* Larry L. Toler, *Civilians on the Battlefield,* ARMY LOGISTICIAN, Nov.-Dec. 1994, at **2, 5** (relating how the DOD and contractor civilians are assigned in the field). "Deployed civilians will now be temporarily detailed to the LSE for command and control and will report directly to the intheater chain of command." *Id.*

[96]*See* FAR, *supra* note **3,** 37.101, defining personal services contract as "a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees (see 37.104)."

97665 F. Supp. 41 (D.D.C. 1987).

lates significant issues concerning government contracts requiring performance of services in the field.[98] This case persuaded the DOD to promulgate new rules determining whether contractor employees actually render military service pursuant to contracts in the field.[99]

In the wake of *Schunacher,* the DOD Civilian/Military Service Review Board (DOD C/MSRB) established new rules which articulate the concept of assimilation.[100] This article will apply these rules to determine whether modern conditions of deployment vest contractor employees with military status and will demonstrate that the existence of the DOD C/MSRB evidences government recognition of the validity of the concept of assimilation. Accordingly, the DOD C/MSRB's evaluation criteria alert contracting officers to site conditions that may classify contractor employees as bona fide members of the Armed Forces of the United States.

The potential conditions of contractor employee service in the field beg for contractual notice provisions. Therefore, this article proposes *DFARS* notice provisions. These provisions are the corollary to the historical practices of the Armed Forces of the United States evidenced by doctrinal and legislative treatment of contractor employees. This article will now articulate the historical and doctrinal bases for the proposed notice provisions.

III. Historical Overview of Contractors in the Field

A. *General*

The hypothetical situation illustrated the contemporary issues that contractor employees face in the field. However, the problems are not new: defense contractors always have plagued commanders.[101] Historically, government contracts have been essential to

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[98] *Id.*

[99] *See* Active Duty Service for Civilian or Contractual Groups, **32** C.F.R. pt. 47, **54** Fed. Reg. 39,993 (1989).

[100] *Id.*

[101] *See* C.G. CRUIKSHANK, ELIZABETH'S ARMY, 28 (Oxford Univ. Press 1946) (describing the difficulties faced by Elizabethan commanders in ferrying troops to the Continent on campaign).

> The masters of these vessels were seldom eager to give their services, for government work of this sort seriously interfered with their private trading activities. Men were at best unprofitable cargo, and at the worst they left disease behind. . . . [A]s a general rule, it was necessary to use persuasion before the merchants would agree to substitute soldiers for more profitable merchandise.

Id.

armed forces' success[102] and contractor employees have served pivotal roles incident to government contract.[103] Accordingly, the government has granted contractor employees special privileges and unique status in the field.

Government practices have historically assimilated contractor employees to their armed forces. Government practices concerning treatment of contractor employees in the field include the following:

(1) granting them prisoner of war status;

(2) exempting them from compulsory military service;

(3) conferring upon them relative rank;

(4) subjecting them to military justice or discipline;

(5) assimilating them to the civilian component of the armed forces.

Using these practices as a benchmark, the following discussion examines the status granted by the British and American governments to civilians accompanying or serving with the armed forces in the field.

B. The British Military Legacy

The legacy of British military history illustrates ancient practices concerning the status of the civilian contractor in the field.[104] British practice included: (1) subjecting civilians to military justice; (2) exempting civilians from military service; and (3) granting contractors relative rank. The key to understanding British, and later American practices, is in its classification of civilians.

The British Army classified those who were not combatants (i.e., infantry, artillery, or cavalry) as either camp followers, retainers-to-the-camp, or sutlers.[105] These classifications existed in both the British and United States military establishments well into the twentieth century.[106] Later, these establishments absorbed these classes of civilians into their hierarchies converting noncombatants

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[102] *See generally* ERSA RISCH, SUPPLYING WASHINGTOS'S *ARMY* (Maurice Matloff, ed., 1981) (describing the evolution of the Army's Quartermaster and Transportation Corps and each department's use of contracted supply and services).

[103] *See generally* BYRON FARWELL, QUEEN VICTORIA'S LITTLE WARS 283 (1972) (describing British Army contingency operations during the nineteenth century). A particularly interesting example is the Nile Campaign to relieve General Gordon at Khartoum. "The most controversial of all Wolseley's ideas, but vital to his plan of the campaign, was that the Nile and its cataracts could be negotiated by specially built whale boats manned by skilled boatmen such as Canadian voyageurs." *Id.*

[104] *See generally* CRUIKSHASK, *supra* note 101; *see also* R.E. SCOULLER, THE ARMIES OF QUEES ANNE (Oxford Univ. Press 1966).

[105] *See* WIESER, *supra* note 18 and accompanying text.

[106] *See generally* FRANCIS A. LORD, CIVIL WAR SUTLERS AND THEIR WARES *25* (1969).

into combatants. In this way, the British legacy set the foundation for the composition and regulation of civilians accompanying and serving with the armed forces in the field.

1. The English Civil War—The English Civil War witnessed a revolution in military supply and organization.[107] English military procurement practices of the seventeenth century foreshadowed those of eighteenth century colonial forces.[108] Two English practices are of note during this period. First, the English subjected sutlers or victuallers to Army control via regulation and military justice. Second, the English exempted certain types of civilian from military service.

In **1642,** The Royalist Army regulated "[c]ommissaries of [v]ictuals and ammunition" under terms of its Lawes and Ordinances of Warre.[109] The ordinances forbade the sale of defective food;[110] forbade soldiers from becoming victuallers;[111] and regulated a victualler's association with soldiers in camp.[112] The Royalist commander had discretion to punish victuallers for violations of these ordinances.[113]

Thus, it was no coincidence that Cromwell's Parliamentary

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[107] IAN GENTLES, THE NEW MODEL *ARMY* IN ENGLAND, IRELAND AND SCOTLAND, 1645-1653 (1992) (describing the ascendancy of Cromwell's premier fighting force during the English Civil War). *But see* MARK A. KISHLANSKY, THE RISE OF THE NEW MODEL ARMY (Cambridge Univ. Press 1979) (asserting a revisionist view that the New Model Army represented nothing new in English military development).

[108] *See* GENTLES, *supra* note 107, at 41, describing the nascent procurement system of the New Model Army as follows:

> The system of provisioning was administered efficiently and, by delivering *materiel* to the army when it was needed, was instrumental in achieving the victories of 1645. Based upon prompt payment in cash, this new centralized system soon supplanted other schemes for equipping the army.

[109] PETER YOUNG & WILLIAM EMBERTON, THE CAVALIER *ARMY:* ITS ORGANIZATION AND EVERYDAY LIFE 172, 184 (1974).

[110] *Id.* (setting forth rules governing victuallers):

> *Victuallers Issuing Naughty Victuals.* No victuallers shall presume to issue or sell unto any of the Army, unsound, unsavoury, or unwholesome victuals, upon pain of imprisonment, and further Arbitrary punishment.

[111] *Id.* (reciting the rule prohibiting soldiers from selling to other soldiers):

> *No soldier must be a Victualler* No soldier shall be a victualler without the consent of the Lord Generall, or others authorized upon pain of punishment at discretion."

[112] *Id.* (setting forth hours of business):

> *Unseasonable Hours Kept by Victuallers.* No victualler shall entertain any soldier in his house or tent, or hut, after the Warningpiece at night, or before they be appraised by the Marshall Generall, upon severe punishment."

[113] *Id.*

forces adopted the ordinances virtually verbatim.[114] In this way, one group of civilians serving with the armed forces in the field found themselves integrated to the military in the interests of military discipline and justice.[115]

Another English practice included exempting certain civilian contractors from compulsory military service. In 1645, Parliament exempted a variety of individuals from service with Cromwell's New Model Army.[116] Thus, English seventeenth century practices parallel American practices of the twentieth century.[117]

2. Eighteenth and Nineteenth *Century* Usages—The British practice of court-martialing civilians and conferring relative rank on certain contractors foreshadowed assimilation practices of the Armed Forces of the United States in World War 11. These practices demonstrate how groups of civilians in the field may assimilate to the armed forces.

English statute authorized the British Army to exercise courts-martial over its civilians as follows:

> All Sutlers and Retainers to a Camp, and all Persons whatsoever Serving with Our Armys [sicl in the Field, tho' no inlisted [sic] Soldiers, are to be Subject to Orders, according to the Rules & Discipline of War.[118]

In this way, the British Army treated its civilian employees

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[114]*See* CHARLES H. FIRTH, CROMWELL'S ARMY: A HISTORY OF THE ENGLISH SOLDIER DURING THE CIVIL WARS, THE COMMONWEALTH, AND THE PROTECTORATE (THE FORD LECTURES) 409, app. L (London, 3d ed. Methuen 1912) (setting forth the New Model Army's Articles of War).

[115]*Id.* at 284 (relating the jurisdiction of the New Model Army's Provost Marshal). "The business of the judge advocate was to draw up charges. . . . The *cus*tody of the prisoners and the infliction of the punishments were in the hands of the provost-marshal-general of the army. . . . Not only the soldiers but all the civilians who followed the army were under his jurisdiction."

[116]*See* GENTLES, *supra* note 107, at 31, observing that exemptions from military service are not a new invention:

> By 25 February 1645 an impressment bill was sent to the Lords. . . . The long list of people and occupations exempt from impressment made it clear that it was the poor who were being targeted . . . all clergymen, scholars, students at law or university, esquires' sons, MPs or peers, mariners, watermen, fishermen and tax officials were exempt.

[117]*See* Schumacher v. Aldridge, 665 F. Supp. 41, 47 (D.D.C. 1987). "Because of their importance to the military, merchant seamen were exempted by Congress from induction into the armed forces for the duration of their service in the Merchant Marine." *Id.*

[118]*See* WIESER, *supra* note 18, at 22 (quoting the "camp follower article," art. 23, sect. XIV, British Articles of War of 1747). ***See also*** Gregory A. McClleland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces,* 117 MIL. L. REV. 153 (1987). ***See generally*** WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 903 (Government Printing Office, reprint 1920) (2d ed. 1896) (reproducing examples of military codes dating from the eleventh century).

like its combatants. Up to thirty-five percent of the British Army during the Revolutionary War consisted of civilians.[119] At this time, the British Army's civil branch included accountants, commissaries, clerks, and physicians — many were "pure civilians" on contract with the Army.[120] Of these civilians, clerks had served as integral parts of small units since Elizabethan times.[121] The civil departments also included contract employees such as "Waggon Master, a Paymaster, servants, sutlers, artificers, drivers, [and] conductors."[122] The British Army subjected them all to military justice in the field. Significantly, the British statute became a fixture in the American Articles of War between 1775 and 1917.123

An American authority would later opine, on the jurisdiction of courts-martial, that contractor employees were "subject . . . to military command, and as a necessary consequence to military law; so that the proof of their submission to one, would seem decisive of their subjection to the other."[124] In British practice however, few contractor personnel found themselves before the drumhead.[125]

Another practice that the British Army used to assimilate its contractor employees included conferring on them relative rank. During Wellington's campaigns against Napoleon, the British Army integrated its noncombatant members by conferring relative rank upon them.[126] This practice, mirrored by United States practice,

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[119] WIENER, supra note 18, at 86

[120] *Id.* at 88 (describing personnel comprising the civil departments of the British Army in 1781). "The Quarter Master General had waggoners and storekeepers, all of them pure civilians, as were several varieties of artificers directed by the Engineer." Id.

[121] *See* CRUIKSHANK, supra note 101, at 43 (noting the importance of paperwork in the sixteenth century). "Next to the captain the most important individual in the company administration was the clerk, a non-combatant, who had great influence, which was seldom used in the interest of the Crown." Id.

[122] *See* WIENER, supra note 18, at 161 (describing the Convention Army under General Burgoyne).

[123] *Id.* at 22-23 (discussing the evolution of the United States version of the camp follower article in its Articles of War). "[T]he same camp follower article was copied verbatim, and indeed was carried on the statute book in that identical form for over 140 years, from 1775 to 1917." *Id.*

[124] *See* Crowder Memo, supra note 39, at 730.

[125] *See* WIENER, supra note 18, at 278 (Listing trials of all civilians by British Army General Courts-Martial between 1775 and 1783. Of 228 civilians tried—exclusive of mariners and ships masters — the British court-martialed only 18 contractors).

[126] *See* id. at 191, which discusses relative rank as follows:

> [The British] conferred relative rank on the several members of the civil departments-doctors, apothecaries, commissaries, judge advocates — so that they could be more conveniently integrated into the hierarchical military community of which, in fact they were an indispensable part. . . . All of them, however, were regarded as non-combatants,

(emphasis added).

gave civilian combat service support employees military status. Today, British and United States Armed Forces have militarized combat service support functions previously performed by contractor employees. Thus, twentieth century contractor employees are merely substitutes for military personnel.[127] In this way, the twentieth century term "noncombatant" merely means that these employees do not perform a combat arms function (such as infantry).

C. The Early American Experience

The United States military has contracted for services since the Revolutionary War.[128] The American military experience with contractor employees parallels British experience. This section examines American practices towards contractor employees including: (1) issuing them government-furnished property; (2) granting them exemptions from military service; (3) conferring on them relative rank; and (4) granting them prisoner of war status.

1. Army Transporters — Like the New Model Army, the Revolutionary Army relied on contracted supply and services.[129] Among the most sought after contractors were teamsters and "waggoners."[130] Not only did these contractors pull supplies to the troops in the field, they accompanied the force as drivers for their "trains of artillery."[131] The problem was retaining enough contractors to haul Washington's artillery, supplies, and troops.

The military tried unsuccessfully to raise and maintain an enlisted corps of wagoners.[132] Like their British predecessors, the American Army's civil departments — Quartermaster General and Wagonmaster General — resolved their lack of core capability

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[127] *See* Toler, *supra* note 95, at 4 (making the argument, conveyed by the Army's Judge Advocate General's Corps during an Army Materiel Command (AMC) task force studying civilian issues, that civilians are combatants). "Civilians who take part in hostilities may be regarded as combatants. . . . Since AMC civilians augment the Army in areas where technical expertise is not available or is in short supply. they in effect become substitutes for military personnel who would be combatants." *Id.*

[128] *See generally* DEP'T OF ARMY, CH. MIL. HIST., STUDY, CONTRACTING IN WAR (15 May 19871 (copy on file with author and Office of The Judge Advocate General. Contract Law Division, DAJA-KL, United States Army, Pentagon).

[129] *See generally* JAMES A. HUSTON, THE SINEWS OF WAR: ARMY LOGISTICS 1775-1953 (1966).

[130] *See* RISCH, *supra* note 102, at 75 (describing critical logistics issues of the Revolutionary War). "Providing enough wagoners was a critical problem. Mifflin [Washington's Quartermaster General] had hired civilian wagoners in 1775. . . . Washington, in January 1777, directed the Quartermaster General to hire wagoners from among the inhabitants and not employ soldiers." *Id.*

[131] *Id.* at 75 (describing transportation procurement problems).

[132] *Id.* at 76.

through contract.[133] However, these contracts brought attendant problems with disciplining contractor employees and ensuring performance. The American solution was to issue government-furnished property to the contractor.

The American practice of providing government-furnished property to civilian contractors is another indicia of assimilation.[134] In 1775, the Army established a practice of providing government-furnished food and supplies to sustain private contractors. During the course of a wagoner's employment, Army delays forced local officials to issue public feed to wagoners to sustain their horses.[135] Recognizing certain advantages from issuing government-furnished property to contractors, the DOD continues this practice today.[136]

The Revolutionary Army not only furnished its property to contractors, it exempted certain contractor employees from the draft. In 1779, to encourage wagoner service, the Continental Congress recommended that the states exempt wagoners from compulsory military service.[137] In this manner, civilian contractors performed service equivalent to active duty while serving with the armed forces in the field. These practices carried into the following century, as a means of encouraging contractor support to the armed forces.[138]

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[133] *Id.* at 87. *Cf.* GENTLES, *supra* note 107, at 48, describing transportation requirements to deliver monthly pay to the New Model Army, "Delivering money was a major operation involving wagons, teams of horses and guards. . . . Twenty-five chests were required to carry less than a month's pay to the army in Dorset in August 1645 . . . requiring twenty-two horses in four teams, and eight drivers."

[134] *See* **FAR,** *supra* note 3, pt. 45.

[135] *See* RISCH, *supra* note 102, at 81.

> [Q]uartermasters detained hired wagons long beyond the time for which the owners had contracted to serve. . . the owners resorted to the public forage magazines to feed their teams. Congress formalized this procedure in the regulation of 14 May 1777. . . . The cost of such forage was then deducted from the money due the owner . . .."

Id.

[136] *See* FAR, *supra* note 3, pt. 45; *see also* Steven N. Tomanelli, *The Duty to Eliminate Competitive Aduantage Arising from Contractor Possession of Government-Furnished Property,* 142 MIL. L. REV. 141 (1993).

[137] RISCH, *supra* note 102, at 87 (discussing exemptions from military service). "[A]ll states exempt wagoners from militia duties and any related fines while they were employed in the service of the United States and that the length of time of such service should be considered as their tour of duty in the militia." *Id. See also* Memorandum of Law, Office of The Judge Advocate General, DAJA-IA, from W. Hays Parks, subject: Executive Order 12,333 and Assassination, 8 (2 Nov. 1989), reprinted in *ARMY* LAW. Dec. 1989, at **4** (discussing immunity from military service as an indicator of civilian employment that is equivalent to military service).

[138] *See* HUSTON, *supra* note 129, at 170 (relating American Civil War personnel shortages and efforts to encourage civilian service).

> A problem which had manifested itself in every war was more pronounced during the Civil War: that of finding men, either military or civilian, to perform the necessary service duties for the staff departments. . . . Draft exemptions were sought for teamsters to encourage them to drive army wagons to western posts; however, teamsters were not only difficult to find, but very often proved to be recalcitrant employees. . . .

Id.

2. Sutlers—The history of sutlers in the United States Army during the 1800s provides additional evidence concerning assimilation of contractors to the armed forces. The United States Army assimilated sutlers to its civil component, by conferring relative rank on them, and treating them as prisoners of war if captured.

During the Revolutionary War, the Army had classified sutlers as camp followers, with attendant status.[139] At that time, the sutler was subject to courts-martial incident to accompanying the force in the field.[140] However, by **1822,** the Secretary of War appointed all sutlers as members of the civil component—thus giving them a monopoly on a designated post.[141] The Army also conferred on the sutler a "definite and respectable rank."[142] The sutler was "considered superior to enlisted men, but without line authority. . . ."[143] During the Civil War, the sutler "could be taken prisoner and exchanged like soldiers."[144]

During the Civil War, the terms of the Dix Hill Cartel fixed the status of sutler as a prisoner of war.[145] In addition to sutlers, the Dix Hill Cartel accorded prisoner of war status to "teamsters and other civilians in the actual service of either party . . . ."[146] The Lieber Code classified sutlers and contractors as public enemies entitled to prisoner of war status.[147] In this way, the contractor employee achieved military status that continued into the next century.

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[139]*See* DAVID M. DELO, PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER 14 (1992). "[Tlhe sutler was simply a civilian who provided a logistical service for the Army . . . his role was limited; he had little official status or was not involved in battles or policy." *Id.*

[140]*Id.* at **51.**

[141]*Id.* at **53.**

[142]*Id.* at **50,** 54 (describing the elevation in esteem of sutlers). "This former camp follower, who was treated like a bastard child for hundreds of years, was now a recognized and integral part of the U.S. Army. He had rank and a home . . . ." *Id.*

[143]*Id.* at 64 (describing relative rank). "An **1835** regulation reconfirmed that the sutler was considered superior to enlisted men, but without line authority; that he was appointed by the Secretary of War for four years. . . ." *Id.*

[144]*Id.* at 133.

[145]*See generally* HOWARD S. LEVIE, DOCUMENTS ON PRISONERS OF WAR, 60 INTERNATIONAL LAW STUDIES (1979) [hereinafter POW DOCS].

[146]*Id.* at **35.** ***See*** *also* HUSTON, *supra* note **129,** at 170 (describing teamster exemptions from the Civil War draft). "Draft exemptions were sought for teamsters to encourage them to drive army wagons to western posts. . . ." *Id.*

[147]*See* POW DOCS, *supra* note **145,** at **35.** The Lieber Code held:

> **A** prisoner of war is **a** public enemy armed or *attached to the hostile army for active aid* . . . . Moreover, citizens who *accompany an army* for whatever purpose such as sutlers, editors, or reporters of journals, or *contractors,* if captured, may be made prisoners of war, and be detained as such.

Id. (emphasis added).

D. Twentieth Century Practices

The American mid-twentieth century experience featured alternatives to civilian contractor support in the field. The Armed Forces of the United States assimilated civilian functions to meet worldwide threats.[148] Consequently, the armed forces used the services of diverse organizations whose members had differing rights and obligations.[149] Eventually, Congress enacted legislation to afford benefits to civilians who served with the United States Armed Forces in the field.[150]

1. Stevedores and Members of Civil Crews—In 1918, The Judge Advocate General, Major General Crowder, opined that the Army could court-martial a stevedore hired by the Quartermaster Department, for stealing an army uniform along the docks in Hoboken, New Jersey.[151] The laborer was subject to court-martial as a person "accompanying or serving with the armies of the United States in the field" pursuant to article 2(d), Article of War.[152] General Crowder's rationale was as follows:

> The operation of the line of communication stretching from the bases of supplies to the battlefield is as essential as maintaining troops along the fighting line, and, indeed the latter depends upon the former. *It cannot be well asserted that those who serve along the line of communication are not serving with the army in the field;* and these lines must necessarily include the bases and extend thence to the zone of actual warfare.[153]

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[148] *See, e.g.,* HUGH B. CAVE, WE BUILD, WE FIGHT! THE STORY OF THE SEABEES 2 (New York, 1944) (describing the Navy's transition from civilian contractor labor to military construction battalions).

> Brave civilians were not enough. Courage alone is not enough. This was a new kind of war. . . . Men were needed who could defend themselves while building such bases, for until the facilities were constructed . . . no combat force of any size could be moved in to provide protection. The men who built those advance bases wold have to supply their own protection.

Id.

[149] *Id.*

[150] *See* G.I. Bill Improvement Act, *supra* note 13.

[151] *See* Crowder Memo, *supra* note 39, at **727.**

[152] *Id.*

[153] *Id.* at **730** (emphasis added).

General Crowder noted that courts-martial jurisdiction also attached to two members of chartered civilian ships.[154] Although this case no longer supports peacetime extension of courts-martial jurisdiction over civilian contractor employees, in light of *Reid v. Covert*,[155] it illustrates the scope of the term "in the field." As a result, the case supports the view that civilians could even assimilate to the armed forces while in the Continental United States.

2. Women in the Army—The Armed Forces of the United States integrated women as contractors or auxiliaries before 1943.156 The experience of women and their efforts to gain full military status in the United States military during the twentieth century reinforces the view that contemporary contractor employees perform, in certain circumstances, service equivalent to active duty. Among the first groups of women to obtain recognition for their service in the field were the Signal Corps Female Telephone Operators Unit of World War I and the Quartermaster Corps Female Clerical Employees serving with the American Expeditionary Forces in World War I.[157]

The United States Army contracted for the services of the aforementioned groups to remedy a shortfall in personnel.[158] Each group obtained "privileges very similar to those of the Army Nurse Corps."[159] At the time, the Army Nurse Corps was classified as "a military organization, but without rank, officer status, equal pay, or Army benefits such as retirement and veteran's rights."[160] Fortunately, each group obtained veteran status as a result of feder-

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[154] *Id.* at 731. *See also Ex parte* Gerlach, 247 F. 616 (S.D.N.Y. 19171 (holding that a civilian who disobeyed an order to stand watch while underway at sea. was in the field); Hines v. Mikell, 259 F. 28 (4th Cir. 1919) (holding that a civilian stenographer employed by the Army at Camp Jackson, South Carolina, was subject to the Articles of War, because he was serving with the army in the field when he violated a military order); *Ex parte* Reed, 100 U.S. 13 (1878) (holding that the Navy could court-martial a civilian paymaster's clerk on contract theory):

> The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. . . . They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also become entitled to a pension and bounty land.

Id. at 21 (citation omitted).

[155] 354 U.S. 1 (1957).

[156] *See generally* MATTIE E. TREADWELL, THE WOMEN'S ARMY CORPS (Kent R. Greenfield, ed.. 19541.

[157] *Id.*

[158] *See* Schumacher v. Aldridge, 665 F. Supp. 41, 44 (D.D.C. 1987).

[159] *See* TREADWELL, *supra* note 156, at 6.

[160] *Id.*

al legislation enacted in 1977.[161] This legislation established the DOD Civilian/Military Service Review Board which favorably reviewed the womens' group applications, that requested veteran status, ex post facto.[162]

The Army's alternative to contracted labor included women auxiliaries. Like the telephone operators, the Army originally denied veteran benefits to members of the Women's Army Auxiliary Corps (WAAC).[163] The WAAC, as originally envisioned, was "to be a corps of 25,000 women for noncombatant service; it was 'not a part of the Army but it shall be the only women's organization authorized to serve with the Army, exclusive of the Army Nurse Corps.'"[164] The WAAC eventually entered the Army as a regular part of the Armed Forces of the United States with regular benefits.[165]

3. The Fighting Seabees—In contrast to the Army experience, the Navy militarized its civilian labor force. The history surrounding the Seabees' raison d'etre exposes some of the myths associated with contractor employees in the field.[166] In December 1941, the Japanese overran Wake Island, Guam, Cavite, and Corregidor.[167] The Naval Civil Engineering Corps (CEC) had hired civilian contractors to build military installations at these locations.[168] When the Japanese invaded, civilian contractor employees found themselves in a combat zone.[169] Not surprisingly, the unarmed civilians

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[161]*See* G.I. Bill Improvement Act, ***supra*** note 13.

[162]*See* 38 U.S.C. § 106, note (setting forth the rules and regulations that implement the G.I. Bill Improvement Act of 1977).

[163]*See* TREADWELL, ***supra*** note 156, at 19.

[164]*Id.* (quoting legislation that proposed creation of the WAAC in 1941) (emphasis added).

[165]*See* Memorandum from Chief Military Affairs, Office of The Judge Advocate General, DAJA-AL, to Assistant Chief of Staff, G-1, subject: S. 924, a Bill "To Define Service as a member of the [WAAC] as Active Military Service Under Certain Conditions" (3 July 1951) (note for retained copy citing the act which converted the WAAC from auxiliary to full military status). The memorandum stated that

> [tlhe WAAC was established by Public Law 554, 77th Congress (Act of May 14, 1942 (56 Stat. 278; 10 U.S.C. 1701) and persons serving in this auxiliary status were not considered in the category of active military service but were subject to all rules, regulations, Courts-Martial procedures, etc., as were male members of the Armed Services. This auxiliary status was converted to military status effective July 1, 1943 by Public Law 110, 78th Congress, (57 Stat. 371) which established the Women's Army Corps [WAC].

[166]*See* ***generally*** CAVE, ***supra*** note 148.

[167]*See* WILLIAM B. HUIE, CAN DO! THE STORY OF THE SEABEES (1945).

[168]*Id.* at 66 (describing the CEC's use of civilian labor before World War II). "Swiftly and methodically, the CEC began negotiating cost-plus-fxed-fee contracts with combinations of private contractors. . . . Attracted by the high wages, thousands of men embarked. . . for Midway, Cavite; for Palmyra and Samoa. ***Id.***

[169]*Id.* at 70.

surrendered, along with the military defenders, to the Japanese forces.

The Japanese accorded the contractor employees prisoner of war status.[170] This classification comported with the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (PW Convention of 1929).[171] The spouse of one of the captured contractor employees advocated for the employees whom the Japanese detained in China.[172] Her view of the legal status of the contractor employees incorrectly assumed that "[tlhe construction men were unarmed; if they attempted any resistance and were captured, they could be legally shot as guerrillas."[173]

The Navy perpetuates this erroneous observation in its official commemorations a half century later.[174] Even the official Naval authorities assert "under international law, [contractor employees] could be executed as guerrillas if caught bearing arms."[175] Notwithstanding these observations, the Navy's decision to militarize construction capabilities was militarily sound.[176] With Japan's

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[170] *Id.* at 71 (inferring that Japanese classification of captured civilian laborers from Wake Island was improper). "Instead of regarding the construction men as civilian internees, the Jap[anese] chose to regard them as prisoners of war." Id.

"'Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 1, 47 Stat. 2021, 2030, T.S. 846 (incorporating Hague Regulation 3 that states "the armed forces of the belligerent parties may consist of combatants and noncombatants"). See Convention Respecting the Laws and Customs of War on Land with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 2296, T.S. 539, 1 Bevans 631 (entered into force Jan. 26, 1910) [hereinafter Hague Convention Annex]. The Hague Convention Annex recited the classes of persons that were included in the armed forces:

> The present Convention shall apply without prejudice to the stipulations of Title VII:
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> (1) To all persons mentioned in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention . . . and captured by the enemy.

[172] *See* HUIE, supra note 167, at 72.

[173] *Id.* at 69.

[174] Robert A. Germinsky, The Fighting Seabees: *WWII* Fact Sheet, NAVY AND MARINE CORPS WORLD WAR II COMMEMORATIVE COMMITTEE (Sept. 1994).

[175] *See* Transamo, supra note 59 (citing the reason for creating the Seabees). "By international law, these workers could not be armed, had no way to defend themselves and had to rely on the Navy for protection." Id.

[176] *See* HUIE, supra note 167, at 77 (relating the difficulties associated with contract administration after contractor employees were captured by the Japanese).

> It is difficult to exaggerate the complexity of the legal and human problems which arose out of these hundreds of civilians being captured by the enemy and considered as prisoners of war. The men were employees of private contractors; as such, they were protected by workmen's compensation laws; but the Navy was under no legal responsibility either for their welfare or for their wages. Moreover, laws governing expenditures by the Navy expressly prohibited the Navy's paying the families of these men.

Id

harsh treatment of the civilian workers as a motivating force,[177] in 1942 the Navy created the "Fighting Seabees"—Construction Battalions ("CBs")—which have formed a unique part of the Navy's CEC ever since.

In 1960, the Supreme Court reflected on the success of the CBs in *McElroy v. Guagliardo*.[178] The Court determined that the Armed Forces of the United States could enlist civilians as specialists, thereby solving its desire to court-martial civilians in peacetime.[179] Because the United States Armed Forces have consciously assigned certain capabilities to the private sector, conscription is not a viable policy option today.[180]

The Supreme Court overlooked the Army's experience with contracted technical observers who submitted to court-martial jurisdiction by contract in the Second World War. From this experience, the DOD can resolve misunderstandings with its contractor employees.

4. *War Department* Field Manual 30-27—While the Navy concerned itself with militarizing the construction industry, the War Department concerned itself with citizens who chose to remain in the private sector. In 1942, the War Department issued *Field Manual* **30-27,** *Regulations for Technical Observers and Service Specialists Accompanying U.S. Army Forces in the Field (Field Manual 30-27).*[181]

This field manual provided commanders and civilian contractor employees remarkably simple guidance concerning all aspects of civilian deployment in the field "within or without the territorial

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[177] *See* CAVE, *supra* note 148, at **1.**

[178] 361 U.S. 281, 287 (1960) (declining to extend court-martial jurisdiction over civilian employees, because the Court perceived that the armed forces could enlist volunteers).

> [Tlhe armed services presently have sufficient authority to set up a system for the voluntary enlistment of "specialists." This was done with much success during the Second World War. "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction in combat areas." 1 Building the Navy's Bases in World War II (1947) 133. Just as electricians, clerks, draftsmen, and surveyors were enlisted as "specialists" in the Seabees, id., at 136, provisions can be made for the voluntary enlistment of an electrician (Guagliardo). . . . The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements.

Id.

[179] *Id.*

[180] *See* DOD TITLE V REPORT, *supra* note 50, at 600.

[181] *See* WAR DEP'T, FIELD MANUAL 30-27, REGULATIONS FOR TECHNICAL OBSERVERS AND SERVICE SPECIALISTS ACCOMPANYING U.S. ARMY FORCES IN THE FIELD (3 Sept. 1942).

limits of the United States."[182] *Field Manual* 30-27 identifies the employee as an individual "officially accredited . . . to a theater of operations or a base command within or without the territorial limits of the United States in time of war . . . ."[183]

The status of Technical Observers tracked the jurisdictional regime of Article of War, section 2(d), stating "although not in the military service, [they] are subject to military law and are under the control of the commander of the Army force which they accompany."[184] Additionally, *Field Manual* 30-27 stated that these employees did not receive service benefits, except for free medical services.[185] They were to be treated as prisoners of war if captured.[186] Interestingly, the War Department afforded Technical Observers "the same privileges as commissioned officers in the matter of accommodations, transportation, and messing facilities."[187]

In 1944, the War Department revised the manual granting contractor employees an assimilated rank and grade for purpose of prisoner of war classification under Article 81, PW Convention of 1929.[188] Like the 1942 version, the new manual required, as part of the accreditation process, that the civilian contractor employee sign an agreement concerning conditions of employment in the field.[189] Currently, the DOD requires such agreements only from emergency-essential civil service employees.[190]

The newly established DOD did not promulgate the doctrine of *FM* 30-27 after 1948.[191] Contemporary commentators suggest that reviving the agreement may be in order.[192] However, the Defense Science Board recommended against this course of action in 1982,

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[182]*Id.* at 1.

[183]*Id.*

[184]*Id.*

[185]*Id.*

[186]*Id.*

[187]*Id.* at 2.

[188]WAR DEP'T, FIELD MANUAL 30-27, REGULATIONS FOR CIVILIAS OPERATIONS ANALYSTS, SCIESTIFIC CONSULTASTS, AND TECHNICAL OBSERVERS ACCOMPANYING U.S. ARMY FORCES IS THE FIELD (31 Aug. 1944) [hereinafter FM 30-27].

[189]*Id.* at 5.

[190]*See* DOD DIR. 1404.10, *supra* note 72, para. D.6 ("[advising] applicants for E-E positions that individuals selected to fill these positions are required to sign written agreements ('DOD Civilian Employee Overseas Emergency-Essential Position Agreement' ").

[191]*See* Jo Ellasera Condrill, Civilians in Support of Military Field Operations (15 Apr. 1993) (unpublished individual study report, United States Army War College).

[192]*Id.*

on the basis that agreements violate privity of contract between contractors and their employees.[193]

E. The Courts Rein in Military Justice

In ***Reid** v. **Covert,*** the Supreme Court limited United States Armed Forces' court-martials of civilians accompanying or serving with the force to "time of war."[194] The Court held that the armed forces did not have court-martial jurisdiction over a military spouse in peacetime England.[195] The opinion, however, did not address whether military had courts-martial jurisdiction over contractor personnel.[196]

In 1970, the United States Court of Military Appeals extended the Supreme Court's prohibition against court-martialing civilian dependents and government employees in peacetime to contractor personnel.[197] Thus, the Armed Forces of the United States are bound by strict interpretation of the UCMJ.[198] Consequently, court-

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[193] *See* OFFICE OF UNDER SEC. DEF. FOR RES. & ENG., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON CONTRACTOR FIELD SUPPORT DURING CRISES 28 (15 Oct. 1982) hereinafter DEFENSE SCI. BD. REPORT], ***reprinted in*** WALT REPORT, ***supra*** note 58, at F-49 (arguing against government-contractor employee agreements to perform).

> The National Security Agency has successfully retained DOD civilians in sensitive and exposed overseas assignments for a number of years. This agency uses a condition of employment agreement and a declaration of intent agreement which provides a clear understanding to the employee of what to expect and what is expected of him. . . . The agreements, described in this paragraph, are between DOD and its employees. They are, therefore, contractual in nature. We think that it is inappropriate for the Government to enter into direct contractual agreements with employees of an industrial contractor. We would suggest instead . . . there should be a clear statement signed by the employee which indicates his understanding of the risks involved and which states the time and conditions during which the employee would be expected to remain.

Id.

[194] *See* 354 U.S. 1, 49 (1957), where Justice Black's majority opinion observes, "Military trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights."

[195] *Id.*

[196] ***But see*** McElroy v. Guagliardo, 361 U.S. 281 (1960); Wilson v. Bohlender, 361 U.S. 281 (1960) (holding that the armed forces may not court-martial civilian government employees accompanying the forces overseas in peacetime).

[197] *See* United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363, 365 (C.M.A. 1970) (holding that the Army could not court-martial a contractor employee, although considered by the court to be "assimilated to military personnel"). "We conclude that the words "in time of war" mean . . . a war formally declared by Congress." ***Id.*** (citation omitted).

[198] *See* UCMJ art. 2, reflecting the requirement for time of war as:

> (a) The following persons are subject to this chapter:
>
> . . . .
>
> (10) In time of war, persons serving with or accompanying an armed force in the field.

martial jurisdiction is a strong indicia of assimilation to the armed forces.[199] Nevertheless, the Armed Forces of the United States still subject civilians to administrative discipline in the field.[200] This factor also is one of seven criteria that determines veteran status.[201]

F. Information Age Warfare

United States policy is to integrate civilian contractor capabilities into its military operations.[202] The Armed Forces of the United States were so successful integrating civilians during Operation Desert Storm that commentators refer to them as "invisible assets."[203] However, civilian contractor employees remained

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[199] *See* 32 C.F.R. § 47.4(b)(1)(v) (citing incidents favoring active duty equivalency). "Those who were serving with the U.S. Armed Forces may have been treated as if they were military and subjected to court-martial jurisdiction to maintain discipline. Such treatment is a factor in favor of recognition." *Id.*

[200] *See, e.g.*, Headquarters, Third United States Army/United States Army Forces Central Command, Gen. Order No. 1 (23 Mar. 1994) [hereinafter ARCENT General Order No. 1] (reciting applicability to all civilians serving in the Saudi Arabian combat zone):

> 1. This General Order is applicable to all U.S. Army Forces Central Command personnel located in the Kingdom of Saudi Arabia on temporary or permanently assigned basis, to include DA civilians, or other civilians operating in support of USARCENT . . . .
>
> 4. THIS ORDER IS PUNITIVE . . . Civilians accompanying the Armed Forces of the United States may face adverse administrative action.

Id.

[201] *See* 32 C.F.R. § 47.4(b)(i)(iv), reciting subjection of civilians to military discipline as an incident favoring active duty equivalency as follows:

> During past armed conflicts, U.S. military commanders sometimes restricted the rights or liberties of civilian members as if they were military members.
>
> (A) Examples include the following:
>
> (1) Placing members under a curfew.
>
> (2) Requiring members to work extended hours or shifts.
>
> (3) Changing duty assignments and responsibilities.
>
> (4) Restricting proximity travel to and from the military installation.
>
> (5) Imposing dress and grooming standards.
>
> (B) Consequences of noncompliance might include a loss of some privilege, dismissal from the group, or trial under military law. Such military discipline acts in favor of recognition.

[202] *See, e.g.*, DEPT' OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Nov. 1994) (making Army casualty procedures applicable to contractor employees). "This regulation remains in effect during full mobilization and applies to . . . [c]ontract field technicians." *Id.*

[203] *See* LMI REPORT, *supra* note 55, at 2-15 (reflecting on the success of civilian contractors in blending into the armed forces). "Probably because of their relatively small numbers and the fact that they dressed in the same attire as the other civilians, the U.S. contractors were not highly visible to logistic commanders at the corps level and below." *Id.* **See** *also* Condrill, *supra* note 191 ("The 'invisible soldiers without uniform,' U.S. government and contractor employees, are an essential component of the 'total force.' Operation Desert Storm could not have been successful without them.").

independent from courts-martial jurisdiction of the armed forces.[204]

As a consequence of ***Reid*** *v.* ***Covert*** [205] and related cases,[206] Armed Forces of the United States have generally refrained from courts-martialing contractor employees.[207] Nevertheless, this has not affected the concept of assimilation. For example, the DOD Civilian/Military Service Review Board (DOD C/MSRB) considers court-martial jurisdiction but one of seven evaluation criteria in granting veteran status to contractors.[208] Significantly, the DOD C/MSRB considers administrative discipline as a separate evaluation factor in its determination of civilian applications for veteran status.[209]

During Operation Desert Storm, contractor employees appear to have assimilated to the Armed Forces of the United States under DOD C/MSRB criteria.[210] The Armed Forces of the United States: (1) integrated civilians into the military support structure — the armed forces issued uniforms, equipment, billets;[211] **(2)** subjected civilians to the disciplinary regime of United States Central Command General Order No. 1;[212] **(3)** prohibited civilians from joining the military — because this would have breached contract;[213] and **(4)** trained civilians in military skills prior to deploying them.[214]

Surprisingly, few contractor employees served with combat units where the potential for conflict was greatest.[215] United States

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[204]*See* UCMJ art. 2(a)(10); ***see also*** Message, Office of The Judge Advocate General, DAJA-CL, subject: Time of War Under the UCMJ and MCM (081900z Feb 91) (informing Army judge advocates that the military lacked jurisdiction to court-martial civilians) (copy on file with the author).

[205]354 U.S. 1 (1957).

[206]Kinsella v. Krueger, 354 U.S. 1 (1957) (holding that the armed forces had no jurisdiction to court-martial the dependent spouse of an airman in peacetime Japan); McElroy v. Guagliardo, 361 U.S. 281 (1960) (holding that the Air Force had no jurisdiction to court-martial a government civilian employee in Morocco); Wilson v. Bohlender, 361 U.S. 281 (1960) (holding that the Army had no jurisdiction to court-martial a civilian employee in Germany).

[207]*See* United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (C.M.A. 1970) (holding that the Army had no jurisdiction to court-martial a civilian contractor in Vietnam during the Vietnam War). ***But see*** Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992) (holding that the United States Army could recall a retired Sergeant Major to active duty to court-martial him for the alleged murder of his spouse in Saudi Arabia while he was serving as a government civil service employee.)

[208]*See* 32 C.F.R § 47.4(b)(1)(v); ***see also supra*** text accompanying note **43.**

[209]*See* 32 C.F.R. § 47.4(b)(i)(iv); ***see also supra*** text accompanying note 201.

[210]*See* 32 C.F.R. § 47.4.

[211]*See* ***id.*** § 47.4(b)(1)(iii).

[212]*See* ***id.*** § 47.4(b)(1)(iv).

[213]*See* ***id.*** § 47.4(b)(1)(vi).

[214]*See id.* § 47.4(b)(1)(vii).

[215]*See* ***generally*** LMI REPORT, ***supra*** note *55.*

contractors fielded up to 988 employees; of these employees, only thirty-six crossed into Kuwait and Iraq during the ground offensive.[216] Each contractor employee served in a designated combat zone.[217] Thus, each contractor employee assumed the same risks as the other members of the Armed Forces of the United States.

The lessons learned from the Gulf Conflict unanimously recommended a doctrinal **fix** to properly accommodate civilian contractors in the field.[218] Although the solution is not yet final,[219] emerging doctrine will dictate how contractor employees support the armed forces in the next century.

IV. Doctrine for the Twenty-First Century

Having examined the historical practices of the armed forces, this portion examines emerging government policies and the Armed Forces of the United States doctrine affecting the status of contractor employees in the field. Incident to their citizenship, United States citizen contractor employees benefit from government policies that protect Americans who become victims of international conflict. Government policies vest certain United States citizens—having no official connection with the government other than citizenship or government contract—with official government status.[220] The following discussion examines this phenomenon.

A. Legal Status and Government Policy

1. Contractor Employees as Combatants—Civilian contractor employees are the legitimate objects of enemy attack.[221] Although

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[216] *Id.* at 2-16.

[217] *See* Combat Zone Order, *supra* note 79.

[218] *See* LMI REPORT, *supra* note 55, at G-4, G-5; ***see*** *also* GAO REPORT B-251383, *supra* note *88; **see** also* DOD IG REPORT 91-105, *supra* note 69, at 12.

[219] *See, e.g.,* DEP'T OF ARMY, [DRAFT] FIELD MANUAL 100-16, ARMY OPERATIONAL LOGISTICS, 3-42 **(4** Dec. 1993) [hereinafter FM 100-161 (describing a broad vision of future operations, the field manual articulates use of contractor services in the field). "The preponderance of field services provided at the tactical level will be met by military personnel, with only a very limited amount being provided by HNS or contractors. Conversely, at the operational level a great deal of field service support will be provided by HNS or contractors." *Id.*

[220] *See, e.g.,* Hostage Relief Act of 1980, 22 U.S.C. § 2658, as amended (reciting benefits administered to victims of hostage-taking by the Department of State under provisions 22 C.F.R. pt. 191).

[221] *See* W. Hays Parks, *Air War and **the Law of** War,* 32 A.F. L. REV. 1. 131 (1990) (discussing whether scientists are legitimate objects of attack).

> The predicament for the law of war was yet another increase in persons in civilian attire who were full-time participants in the military effort of

civilian contractor employees are classified as "noncombatants," pursuant to Hague Convention IV, they form part of the armed forces in the field.[222] The distinction between a uniformed contractor and an infantryman is meaningless to the enemy soldier who has each in his rifle sights.

The International Committee of the Red Cross views certain groups of civilian participants in armed forces activities as "incorporated" to the armed forces as members of the armed forces.[223] Whether the United States can classify its contractor employees as "members of the armed forces" for the purposes of domestic law remains a hotly contested issue.[224] However, potential enemies may not be able to distinguish contractor employees from other members of the armed forces in the field. Because commanders may arm, dress, train, and restrict contractor employees in the field, these employees have become de facto combatants.[225]

2. Contractor ***Employees*** as Prisoners *of* War—The DOD requires commanders to issue identity cards to all civilian contractor employees,[226] following the requirements of international law.[227] The DOD Instruction requires commanders to issue a Geneva

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> their nation, even in some cases in military operations, and not with a weapon. . . . Under customary international law, there seems to be no reason why these individuals would not be regarded as combatants and subject to attack at all times . . . ."

Id. But see Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field,* ARMY LAW., July 1994, at **29,** 30 (discussing the ambiguities created by Article 50, Protocol I to the 1949 Geneva Conventions which would protect all civilians from deliberate attack).

[222]*See* Hague Convention Annex, *supra* note **171,** art. 3, 36 Stat. 2296.

[223]*See* PROTOCOL COMMENTARY, *supra* note **1,** at **515** (discussing the combatant status of members of the civil department and combat service support branches of the armed forces).

> The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and noncombatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. . . . Whether they actually engage in firing weapons is not important. They are entitled to do so. . . . **A** civilian who is incorporated in an armed organization [referring generally to volunteers and auxiliaries] becomes a member of the military and a combatant throughout the duration of the hostilities . . . .

Id.

[224]*Id.*

[225]*Id.*

[226]*See* DEP'T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS (30 Jan. 1974) [hereinafter DOD INSTR. 1000.11.

[227]*See* GPW-49, *supra* note **1,** art. 4(A)(4), *6* U.S.T. 3320 (reciting the requirement for the armed forces to issue to those accompanying the Armed Forces an identity card—"[W]ho shall provide them for that purpose with an identity card . . . .").

Convention identity card, DD Form 489, to "such individuals departing the continental limits of the United States to serve elsewhere."[228] Additionally, the DOD Instruction directs each DOD component to assign rank equivalency under "an appropriate Geneva Convention Category" to contractor employees.[229] Unfortunately, contracting officers will find no such guidance on this matter in government acquisition regulations.

3. Capture and Detention Benefits—The government furnishes contractors capture and detention benefits under the *DFARS*.[230] Additionally, foreign relations legislation grants all United States citizens additional benefits as a consequence of becoming victims of foreign hostage taking and terrorism.[231]

If captured or detained as a result of hostage taking or terrorism, a United States citizen is entitled to Soldiers' and Sailors' Civil Relief Act protections.[232] Additionally, the United States citizen is entitled to Federal Employees' Compensation Act (FECA) insurance coverage.[233] Other benefits include medica1234 and educational payments.[235] In this way, the United States government converts its citizen contractor employees to quasi-government employees. The umbrella of benefits suggest that contractor employees might enjoy official status while serving with the Armed Forces of the United States in the field.

4. Foreign Criminal *Jurisdiction*—Department of Defense policy obliges the services to protect the rights of United States personnel, accompanying the forces, who face incarceration overseas.[236] This policy effects legislative intent under 10 U.S.C. § 1037, as

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[228]*See* DOD INSTR. 1000.1, *supra* note 226, para. V.B.

[229]*Id.* para. VI.

[230]*See* DFARS, *supra* note 10, 252.228-7003 (describing the United States undertaking to reimburse contractors for payment of salary or wages for employee captured by a "power not allied with the United States in a common military effort"); *see also* Compensation for Injury, Disability, Death, or Enemy Detention of Employees of Contractors with the United States, 20 C.F.R.§ 61.300.

[231]*See* Hostage Relief Act of 1980, Pub. L. No. 449, 94 Stat. 1967 (1980) (codified as amended at 5 U.S.C. § 5561n); *see also* Hostage Relief Assistance, 22 C.F.R. pt. 191; Victims of Terrorism Compensation, *id.* pt. 192.

[232]*See* 22 C.F.R.§§ 191.11, 192.21.

[233]*See id.* § 192.50.

[234]*See id.* § 191.21.

[235]*See id.* § 191.30.

[236]*See* 32 C.F.R. § 151.3 (reciting DOD policy). "It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons." *Id.*

amended.[237] The DOD's foreign criminal jurisdiction regime permits the Armed Forces of the United States to pay counsel fees, court costs, bail, and interpreter fees in foreign criminal cases.[238] However, Army and Navy rules implementing the statute prohibit payment of benefits on behalf of contractor employees.[239] Contractors must make a special request for provision of funds under DOD policy.[240]

Congress intended to remedy the effects of Reid *v. Covert*[241] by extending coverage of the statute to "civilian employees and dependents accompanying the armed forces overseas."[242] Inexplicably, Congress excluded contractor employees from the class of persons accompanying the armed forces overseas to receive coverage under the act.[243] Notwithstanding the exclusion, DOD policy gives the "appropriate Service Secretary or designee" authority to pay benefits on behalf of contractor employees under this statute.[244] Thus, the

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[237] *See* 10 U.S.C. § 1037(a) (as amended) (granting service secretaries the authority to protect United States personnel overseas).

> Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice *and of persons not subject to the Uniform Code of Military Justice who are employed by or accompanying the armed forces* in an area outside the United States . . . .

Id. (emphasis added).

[238] *Id.*

[239] *See* DEP'T OF ARMY, REG 27-50, STATUS OF FORCES POLICIES, PROCEDURES AND INFORMATION, para. 2-2c (15 Dec. 1989) [hereinafter AR 27-50] (restricting payments on behalf of contractor employees). "Funds under 10 U.S.C. 1037 will not be used to provide legal representation to indirect hire and contractor employees . . . ." *Id.*

[240] *Id.* para. 2-2d (allowing contractors to apply for assistance under 10 U.S.C. § 1037). "Personnel not eligible under the above criteria may request funds for the provision of counsel and payment of expenses in exceptional cases . . . to the appropriate Service Secretary or designee." *Id.*

[241] 351 U.S. 1 (1957).

[242] *See* Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, tit. VI, § 681(a), 99 Stat. 583, 665; *see also* S. 1160, 99th Cong., 1st Sess. § 681, 2 U.S.C.C.A.N. 533 (stating that contractor personnel are excluded from coverage).

> Section 681 would extend to civilians employed by or accompanying the armed forces overseas the benefits presently accorded service members when they are called before foreign judicial tribunals.
>
> [A]t one time "persons subject to the Uniform Code of Military Justice" were believed to include civilian employees and dependents accompanying the armed forces overseas. The courts have held otherwise, however. The committee recommends clarification of section 1037 to ensure coverage for both classes of people . . . those not subject to that code [UCMJ] who work for or accompany our armed forces in foreign countries. *This second class would not include contractors or their employees who might be serving with the armed forces overseas.*

Id. (emphasis added)

[243] *Id.*

[244] *See* AR 27-50, *supra* note 239, para. 2-2d.

Armed Forces of the United States have established another practice indicative of the special status held by contractor employees in the field.

5. The Defense Base Act—Government rules indemnifying contractors for "war hazards" costs is another indicia of the official nature of the contractor employee's status in the field.[245] The *FAR* requires contractors to obtain workers compensation insurance[246] under the Base Defense Act, and war hazard insurance[247] when the contract must be performed overseas.

The Base Defense Act applies to "public works" connected with overseas construction, including service contracts.[248] The War Hazards Compensation Act applies to any overseas services contract.[249] The Office of Worker's Compensation Programs, Department of Labor, administers benefits under the Base Defense Act and War Hazards Compensation Act.[250]

Contractors bear the burden of obtaining such insurance.[251] Although the government generally undertakes to indemnify contractors for all losses,[252] the contractors must present valid claims for reimbursement.[253] For all intents and purposes, contractor

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[245] *See* FAR, *supra* note 3, 52.228-3; 52.228-4.

[246] *See id.* 52.228-3 (requiring insurance under the Defense Base Act).

[247] *See id.* 52.228-4 (requiring both workers' compensation and war hazard insurance overseas).

[248] *See* 42 U.S.C. §§ 1651-1654 (extending the benefits of the Longshoremen's and Harbor Worker's Compensation Act to both government and contractor employees engaged in overseas public works projects). ***See*** *also* Republic Aviation Corp. v. Lowe, 69 F. Supp. 472 (S.D.N.Y. 1946), *aff'd,* 164 F.2d 18 (2d Cir. 1947), *cert.* ***denied,*** 333 U.S. 845 (1948) (extending the definition of public work to include furnishing of test pilots in connection with a maintenance and repair contract during World War II).

[249] *See* 42 U.S.C. §§ 1701-1712 (originally enacted as Act of Dec. 2, 1942, ch. 668, § 101, 56 Stat. 1028).

[250] *See* Compensation for Injury, Disability, Death, or Enemy Detention of Employees of Contractors with the United States, 20 C.F.R. pt. 61 (detailing the procedures and benefits that accrue claimants under the Base Defense Act and War Hazards Compensation Act). *Cf.* Hostage Relief Assistance, 22 C.F.R. pt. 191.

[251] *See* FAR, *supra* note 3, 52.228-4.

[252] *See* DFARS, *supra* note 10, 252.228-7000, (Reimbursement for War-Hazard Losses, requiring the contractor to submit proof of loss subsequent to obtaining war-hazard insurance).

[253] *See* Kent Line Limited, ASBCA No. 45326, 94-2 BCA ¶ 26,722 (holding that the government had no contractual obligation to reimburse additional war risk insurance purchased by the owners of a vessel chartered for passage into the Persian Gulf war zone); *see also* Kong Yong Enterprise, ASBCA No. 21605, 80-1 BCA ¶ 14,314 (dismissing a contractor's claim for equipment abandoned in Vietnam because the contractor had no war risk insurance costs to be reimbursed); Farrell Lines, Inc., ASBCA No. 13143, 69-1 BCA ¶ 7685 (holding that the owners of a vessel detained in the Suez Canal, after Egypt blocked the canal, could not seek indemnification of war risk insurance costs until the private insurer's claim was settled).

employees are considered to be government employees for Defense Base Act benefits.[254] In this way, contractor employees achieve another indicia of assimilation to the armed forces.

6. The ***NATO SOFA*** Model—The German and American governments consider contractor employees, deployed as "technical experts," to be government employees or members of the "civil component."[255] This is another indicia of the official status of contractor employees serving with armed forces. However, Army contracting officers must accredit these employees to the deployed forces.[256]

The Army Contracting Support Agency requires Army contracting officers to certify contractor employees as "technical experts."[257] Not all employees will qualify as experts.[258] However,

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[254]*See* Republic Aviation Corp, 69 F. Supp. 472 (S.D.N.Y. 1946), *aff'd,* 164 F.2d 18 (2d Cir. 1947), *cert. denied,* 333 U.S. 845 (1948).

[255]*See* Supplementary Agreement to the NATO SOFA, ***supra*** note 21 and accompanying text.

[256]*See* Memorandum, Office of the Assistant Secretary of the Army, United States Army Cont. Support Agency, SFRD-KP, to [acquisition personnel], subject: Acquisition Letter (AL) 94-6, para. IX (18 Aug. 1994) [hereinafter AL 94-61 (copy on file with the author and Contract Law Division, JAGS-ADK, The Judge Advocate General's School, United States Army) (reciting criteria for extending logistics support to contractor employee in Germany and Italy certifying "technical expert" status under article 73, Supplementary Agreement to the NATO SOFA).

> SPECIAL NOTICE TO DOD CONTRACTING OFFICERS EXECUTING CONTRACTS TO BE PERFORMED IN GERMANY AND ITALY THAT SUPPORT U.S. GOVERNMENT MISSIONS AND INVOLVE INDIVIDUAL LOGISTIC SUPPORT AND PRIVILEGES GRANTED BY . . . (USAREUR), AND SEVENTH *ARMY* TO CONTRACTOR PERSONNEL AND THEIR FAMILY MEMBERS. FAILURE TO COMPLY WITH THIS DAC MAY RESULT IN REFUSAL OF INDIVIDUAL LOGISTIC SUPPORT AND PRIVILEGES TO CONTRACTOR PERSONNEL.

Id.

[257]*Id.* para. IX, outlining the duties of contracting officers as follows:

> f. Contracting officers shall:
>
> (1) ensure that technical expert status, as defined in Appendix A, and individual logistic support are required to attract the skills required for effective contract performance . . . .
>
> (2) have contractor complete and sign the certificate prescribed at Appendix B, for filing with the master contract.
>
> (3) have contracted employee complete and sign the questionnaire prescribed at Appendix C, for filing with the master contract.
>
> (4) define in the contract the items of logistics support provided by the government to the contractor personnel and specifically state if logistic support is extended to dependents/family members . . . .

[258]*Id.* app. A, para. IX, alerting contracting officers to categories of contractor employees denied "technical expert" status as follows:

> c. The following are examples of positions that have been denied "technical expert" status under Article 73:
>
> (1) Administrative personnel.
>
> (2) Sales representatives for computers, encyclopedias, clothes, china, jewelry and similar items.

the Army uses this accreditation to attract contractors to Europe,[259] and to save money.[260] This guidance provides a much needed supplement to *DFARS* planning requirements.261 However, this policy does not require contracting officers to apply similar accreditation procedures to deployments in the field. As a result, notice provisions are necessary.

The deficiency in the *DFARS* and *FAR* is illustrated by contractor employee deployment to Saudi Arabia. In Saudi Arabia, the terms of international agreement exclude contractor employees from the PX and commissary.[262] Although promised equal logistic support to soldiers, contractor employees are dismayed to learn that they cannot enter the PX or commissary. Had Acquisition Letter 94-6 been in effect during 1990, the government could have anticipated difficulties with the operative international agreement.

Acquisition Letter 94-6 helps to define, integrate, and support contractor employees in the field. Contracting officers should apply its criteria to all overseas deployment of contractor employees. Using the concept of assimilation, the government could classify its contractor employees as members of the "civil component" of deployed armed forces. In this way, the government could solve contractor perceptions of inequitable treatment.

7. *Discipline*— During peacetime, field commanders have no military justice jurisdiction over contractor employees.[263] Nevertheless, commanders have administrative authority to regu-

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(3) Automobile sales representatives.

(4) Secretaries, clerk typists.

(5) Carpenters, masons, painters and plumbers.

[259]*Id.* para. 2b, app. A, § IX (setting forth the rationale for hiring contractor employees). "The contracting officer makes a written determination . . . to attract the technical skills needed for effective contract performance." *Id.*

[260]*Id.* para. 2c, app. A, § IX (discussing cost savings). "Financial savings realized by conferring 'technical expert' status . . . are reflected in the contract price." *Id.*

[261]*See* DFARS, *supra* note 10, 225.802-70, discussing contracting officer duties when contracts require performance overseas as follows:

> (b) Where the acquisition requires the performance of work in the foreign country by U.S. personnel . . . or where the acquisition will require logistics support for contract employees . . .
>
> (1) the contracting activity must coordinate with the cognizant contract administration office before contract award.
>
> (2) lthe contracting officer shall request
>
> (i) The applicability of any international agreements to the acquisition;
>
> . . . .
>
> (v) Availability of logistics support for contractor employees . . . .

[262]*See* USMTM Accords, *supra* note 53, art. 9H, 28 U.S.T. at 2412 (barring contractor personnel from the PX and commissary).

[263]*See* UCMJ art. 2(a)(10).

late civilians serving with or accompanying the armed forces in the field.[264] Under terms of government contract, commanders could impose administrative sanctions upon contractor employees who violate local policies.[265] However, commanders would have to tailor their sanctions to prevent adverse effects on their mission.

B. Life Support Schemes for the Civilian Employee

Army doctrine is beginning to address how to provide comprehensive life support for civilians in the field. Life support organizations control civilians in the field. This section will examine two types of life support organizations that the Army proposes to control and integrate civilians with the armed forces in the field: (1) the AMC's strategic Logistical Support Element (LSE); and (2) the Defense Logistics Agency's (DLA) Contingency Support Team (DCST).

1. The AMC and the Logistics Support Element.—*In* 1994, the Army approved the AMC's strategic LSE concept.[266] The Army authorized 1276 civilian positions to fill the Table of Distribution and Allowances for the LSE.[267] The LSE concept demonstrates how serious the Army is about integrating contractor employees into the total force projection capability of the armed forces. The LSE creates a life support organization for all civilian employees in the field. The concept plan describes the LSE as follows: "The unit consists of a modular easily deployed . . . organization having the ability to provide hands on maintenance and supply functions and the supervision of contractor activities . . . ."[268] The LSE serves as a

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[264] *See* ARCENT General Order. No. 1, *supra* note *200*.

[265] *See* AFARS, *supra* note 31, 37.7098-1(c) (reciting travel-related sanctions against the contractor for employee misconduct). ***See*** *also id.* 37.7096-3 (Removal):

> The contracting officer may require the contractor to remove from the job contractor personnel—
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> (a) for misconduct on or off duty,
>
> (b) for conduct reflecting adversely against the interests of the United States,
>
> (c) for conduct which endangers persons of property, or
>
> (d) whose continued employment under the contract is inconsistent with the interest of military security.

[266] *See* Message, Headquarters, AMC, subject: Logistics Support Element (LSE) (101500z Feb 94) (copy on file with the author and Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon).

[267] *Id.*

[268] *See* Memorandum, Office of Deputy Chief of Staff for Operations and Plans, DAMO-FDF, to Commander, U.S. Materiel Command, subject: Logistics Support Element (LSE), encl. (2 Feb. 1994).

"chain of authority" for civilians, and provides a commander a single point of contact for civilian-related issues."[269]

Unfortunately, the LSE concept is limited to managing AMC government employees and AMC-managed contractor employees.[270] The LSE concept presumes that all civilians have processed through AMC's central departure point.[271] The central departure point multiplies the efficiency of deploying contractor civilians from one location, but requires additional contract clauses "to include deployment processing requirements in the statements of work."[272]

Another disadvantage of the LSE is that the "chain of authority" remains outside of the field commander's direct influence because its personnel report to Headquarters, AMC.[273] Thus, the LSE concept does not correspond with the principles of war concerning unity of command and simplicity. However, in the contracting arena, the "chain of command" for contracts flows through the contracting officer to the contractor. Accordingly, the LSE, acting as focal point for AMC contracts, will permit commanders to turn to a single point of contact to resolve contract issues.

2. The *DLA Contingency Support* Team—The DLA advocates its own version of the LSE: the DLA DCST.[274] The DCST concept differs from AMC's plan in that the organization is subordinate to the appropriate field commander.[275] Unlike the LSE, the DCST concept does not provide organic support.[276] The concept places predeployment responsibilities on the supported command via a memorandum of understanding (MOU).[277] The advantage of this organi-

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[269]*See* Toler, *supra* note 95. at 5.

[270]*Id.*

[271]*See* UNITED STATES ARMY MATERIEL COMMAND, AMC CIVILIAN DEPLOYMENT GUIDE, 17 (Mar. 1994) [hereinafter AMC GUIDE].

[272]*See* Schandelmeier, *supra* note 51, at 34 (describing efforts taken to process civilian contractor employees at Aberdeen Proving Grounds during Operation Desert Shield). "Contracts were written or amended to include deployment processing requirements for contractors in the statements of work." *Id.*

[273]*See* Toler, *supra* note 95. at 6.

[274]*See* Draft Concept Plan, Defense Logistics Agency Contingency Team (12 Oct. 1993) (copy on file with the author and Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army. Pentagon).

[275]*Id.* para, IIB (describing command and control relationships). "[The] DLA will remain a separate entity in direct support of and under the operational control of the unified command/JTF staff." *Id.*

[276]*Id.* IIC (describing administrative and logistical support). "Headquarters DLA will negotiate with the supported force to provide administrative and logistical support to the employed DCST. These support arrangements will be formalized in the MOUs with the designated unified command . . . or be negotiated separately as requirements are defined." *Id.*

[277]*Id.*

zation is that the field commander maintains unity of command and control over deployed civilians. The DCST concept fields contract administration teams, but places the planning requirement on a suborganization: the Defense Contract Management Command.[278] As currently configured, the DCST does not provide a life support structure for civilian contractors.

Overall, both the AMC and DLA efforts are commendable attempts to solve the support issues facing civilians in the field. This is a developing area with considerable promise. The Army's vision for Force XXI should help to shape the concept plans.

C. Army Vision of Future Operations

1. Force Projection *and Contractors*—Department of Defense manpower utilization policy encourages the Army to hire contractor employees "to do essential work not requiring military-unique experience."[279] Proper employment of civilian contractor employees meets the operational characteristics of Army logistical operations[280] and tenets of operations.[281]

Contracting officers must anticipate the requirements for contractor services in the field. Contractor employees may provide services along the entire depth of the area of operations, not just the "rear" areas.[282] Thus, the contractor employee must have the agility and versatility to accomplish Army requirements under government contract. Finally, as evidenced by proposed deployment concepts, the contractor employee's efforts must be synchronized to deliver services at the time and place required.

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[278] *Id.* Tab B.

[279] *See* DEP'T OF DEFENSE, DIR. 1100.18, WARTIME MOBILIZATION PLANNING (31 Jan. 1986).

[280] *See* FM 100-5, *supra* note 6, at **12-3** (describing the characteristics of good logistical operations). "Five characteristics facilitate effective logistics operations . . . anticipation, integration, continuity, responsiveness, and improvisation—[which] enable operational success." *Id.*

[281] *Id.* at 2-6 (outlining the Army's operational tenets). "The Army's success on the battlefield depends on its ability to operate in accordance with five basic tenets *initiative, agility, depth, synchronization, and versatility." Id.*

[282] *See* PAGONIS, *supra* note **54,** at 208 (reiterating General Pagonis's view that logistical support bases can be located forward of combat troops).

> It seems clear that the logbase concept proved itself, at least in this particular desert context. Our willingness to place these bases alongside (and in some cases, in front of) the combat-arms troops was surprising to some, but I would argue that it didn't contradict established doctrine. Instead we tailored doctrine to the needs of the theater.

Id.

Army doctrine states "[clontracted logistics may provide some initial support and augment military capabilities."[283] The Army also acknowledges that operational logistics extend beyond the theater to the home base.[284] Further, the Army exhorts its "[pllanners [to] consider that assured availability of civilian and contractor support will be necessary for virtually all deployment and logistics operation~.' The details that implement this operational scheme, however, remain unresolved.

The Army's draft *Field Manual 100-16, Army Operational Logistics,* discusses the command relationship between the LSE its supported command, and its technical channels.[286] Unfortunately, it fails to mention other life support organizations, such as the DCST, nor does it discuss the status of civilian contractors in the field. However, it recognizes the importance of contractor services at various operational levels: an important first step.[287]

The Deputy Chief of Staff for Personnel (DCSPER) is responsible for civilian personnel management in the field. The manual specifies that the "Director of Civilian Personnel (DCP), DCSPER, will develop civilian personnel policy."[288] In absence of policy, the contracting officer, life support organization, field commander, and planning staffs need to integrate civilian contractor employee deployment requirements into operations plans and supporting contracts.

To overcome lack of doctrine, the Army is drafting mobilization plans to accommodate contractor employees in the field. The following section examines the Army Mobilization and Operations Planning and Execution System (MOPES).

2. MOPES — Although Army logistics and personnel planners anticipate that United States citizen contractor employees will deploy in support of Army operations overseas, the details remain obscure. Army logisticians understand that the Army will only support contractor employees "to the extent specified in their con-

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[283] *See* FM 100-5, *supra* note 6, at 3-6.

[284] *Id.* at 12-2 (reciting operational doctrine). "Contractors and civilians provide support from within as well as from *outside* the theater of operations. In theater, contractors and DOD civilians assigned to a ***logistics*** *support* ***element*** perform specified support functions. . . ." *Id.* (emphasis added).

[285] *Id.* at 12-6.

[286] *See* FM 100-16, *supra* note 219.

[287] *Id.* at 3-42 (reciting the operational versus tactical importance of contractors). "The preponderance of field services provided at the tactical level will be military personnel, with only a very limited amount provided by HNS [Host Nation Support] or contractors. Conversely, at the operational level a great deal of field service support will be provided by HNS or contractors." *Id.*

[288] *Id.* at 5-15.

tracts."[289] Army personnel planners anticipate that "[clontractors will deploy through a central processing point, either a soldier readiness processing (SRP) center which already serves as a deployment point for government civilians, or a CONUS replacement center (CRC)."[290] Planners assume that SRPs and CRCs are ready for action.[291] The AMOPES plan requires that contractor employees meet physical and military standards in addition to technical proficiency.[292]

Therefore, the Army's vision of the twenty-first century contractor employee anticipates that contractors will provide technicians qualified as part-time warriors. The AMOPES plan suggests that commanders: (1) define essential services required during crises; (2) use cost plus fixed fee pricing as a separate line item; **(3)** identify the contractor's chain of authority; **(4)** identify the *contractor's* deployment plan; and ***(5)*** include mandatory contract clauses.[293]

The AMOPES plan reflects Army experience with its integrated logistics support program and its logistics civil augmentation program.[294] While the provisions may work well for Brown and Root which regularly deploys its employees in the field,[295] the provisions are unlikely to win favor with a major systems contractor planning to support a system intended for domestic delivery. An attempt to enhance government rights to continued contractor performance during crises, and allow for contingency planning, expired in **1994.**

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[289] *See* Draft, Annex D (Logistics) to Army mobilization and Operations Planning and Execution System (AMOPES) (undated draft obtained January 1995, on file with Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon) [hereinafter Annex D, AMOPES].

[290] *See* Tab H, App. **3,** Annex E, AMOPES, *supra* note 84.

[291] *Id.*

[292] *Id.* para. 2b(2) (outlining predeployment standards for contractor employees supporting mobilization in the field). "Contractor employees occupying designated essential positions must meet established medical and physical standards. They must be properly trained in basic soldier field survival tasks and performance of duties in protective gear. Weapons (sidearms) familiarization may or may not be necessary." *Id.*

[293] *Id.*

[294] *See, e.g.,* FM 700-137, *supra* note 33.

[295] *See* Jerry *R.* Rutherford & Daniel V. Sulka, *Making FM 100-5 Logistics a Reality,* MIL. REV., Feb. 1994, at 11 (discussing combined logistics operations in Somalia).

> Currently 2,500 of the approximately 4,000 US troops in support of. . . Operation Restore Hope in Somalia are US Army combat service support soldiers . . . In conjunction with contractors from the Brown and Root Corporation under the US Army Logistical Civil Augmentation Program, these soldiers provide diverse services and materiels to all UN forces daily.

Id.

3. Emergency-Essential Clause—In August 1994, the DAR Council set back effective contractor employee mobilization planning by withdrawing a proposed *DFARS* clause that implemented DOD Instruction 3020.37, Continuation of Essential Contractor Services During Crises.[296] As a result, the Armed Forces of the United States must rely on standard contract clauses to ensure contractor performance during crises or war.[297]

The proposed clause dates to the fielding of the Army's Mobile Subscriber System (MSE) in Korea during 1988.[298] The clause anticipated unusual site conditions occasioned by potential rioting during the Korean Olympic Games of 1988.[299] The clause differed from standard default clauses, because it specifically required contractors to perform under crisis conditions. Normally, acquisition rules regard crisis conditions as an unusual occurrence that excuses performance.[300]

To ensure continued performance during crisis, contracting officers could request waivers and insert the clause as a deviation from procurement regulation.[301] Additionally, contracting officers could consider inserting the proposed notice provisions to reflect the specific requirements of duty in the field dictated under AMOPES. In this way, both the government and the contractor would understand the nature of their respective commitments. The government commitment may include extension of veteran status to contractor employees: the focus of the next part of this article.

V. Analysis Under DOD C/MSRB Criteria

A. Introduction

So far this article has examined the historical and doctrinal bases supporting the view that contractor employees hold military status in the field. This part of the article reinforces this view by analyzing contractor status under Department of Defense Civilian/Military Review Board (DOD C/MSRB, or board) criteria.

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[296] *See* DFARS Withdrawn Proposal, *supra* note 73.

[297] *See, e.g.*, FAR, *supra* note 3, 52.237-3 (Continuity of Services).

[298] *See* Message, Headquarters, Army Materiel Command, AMCPP, subject: Special Provisions for Contracts for Emergency Essential Contractor Services During Crises in the Republic of Korea (1320552 May 881 (copy on file with author).

[299] *Id.*

[300] *See* FAR, *supra* note 3, 52.249-8 (reciting acts of a public enemy as an excuse for performance).

[301] *See* DFARS, *supra* note 10, 201.402.

The DOD C/MSRB determines whether the service of groups of civilians was the equivalent of active military service during periods of armed conflict.[302] The board's evaluation criteria provide a concrete methodology for determining who, when, where, and how civilian contractors assimilate to the armed forces.[303] The existence of the DOD C/MSRB indicates government recognition of the validity of the concept of assimilation.

B. Background

The DOD institutionalized the concept of assimilation when it established the C/MSRB.[304] Congress made the concept of assimilation relevant to modern contingencies when it amended 10 U.S.C. § 106.[305] This part of the article applies DOD C/MSRB criteria to contemporary contingencies demonstrating that government contracts create a new class of veteran.

The Department of Veterans Affairs grants veterans benefits to groups of government contractor employees whom the DOD C/MSRB has certified as having rendered services equivalent to active military service.[306] The DOD C/MSRB reviews applications of groups of government and contractor employees who claim veteran status as a result of their performance of contracts during periods of armed conflict.[307] This board has granted veteran status to the members of twenty-six groups.[308] The existence of this board has far reaching implications for all government service contracts.

1. The Statute—In 1977, Congress amended **38** U.S.C. § 106, Certain Service Deemed to be Active Service, and created a new class of veteran.[309]

Congress drafted the original statute granting veteran status to members of the WAAC who served before the WAAC assimilated into the Regular Army in 1943.[310] The 1977 version intended to remedy the claims of the Women's Air Forces Service Pilots

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[302]*See* 32 C.F.R. pt. 47.

[303]*Id.* § 47.4.

[304]*See* DEP'T OF DEFENSE, DIR. 1000.20, DETERMINATIONS OF ACTIVE MILITARY SERVICE AND DISCHARGE: CIVILIAN OR CONTRACTUAL PERSONNEL (9 June 1983);**see** *also* DEP'T OF DEFENSE, DIR. 1000.20, ACTIVE DUTY SERVICE DETERMINATIONS FOR CIVILIAN OR CONTRACTUAL GROUPS (11Sept. 1989) [hereinafter DOD DIR. 1000.20(1989)].

[305]G.I. Bill Improvement Act, *supra* note 13.

[306]*See* DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS, **2** (1994) [hereinafter VA BENEFITS].

[307]*See* 32 C.F.R. § 47.1.

[308]VA BENEFITS, *supra* note 306, at 28.

[309]*See* G.I. Bill Improvement Act, *supra* note 13, § 401(a)(1).

[310]*See* Pub. L. No. 85-857, 72 Stat. 1110(1958) (originally codified at 38 U.S.C. § 106).

(WASPs)—a group of federal civil service employees—that their service was equivalent to active service and that they deserved veterans benefits.[311]

Congress extended the benefit of the statute, subject to rules established by the Secretary of Defense, as follows:

> [T]he service of . . . any person in any similarly situated group [to the WASPs] the members of which rendered service to the Armed Forces of the United States in a *capacity considered civilian employment or contractual service* at the time such service was rendered, shall be considered active duty for the purposes of all laws administered by the Veteran's Administration . . . .[312]

In 1977, the rules required consideration of five factors that included the group having "acquired a military capability;" "assignment for duty in a combat zone;" and "reasonable expectations that their service would be considered to be active military service."[313] As a result of this legislation, fourteen of sixty-four groups successfully applied for veterans status.[314] However, when members of the Merchant Marine sought benefits under the statute, they forced a sea change in regulation that significantly affects the status of all contractor employees serving with the Armed Forces of the United States in the field.

2. *The Case of* Schumacher v. Aldridge—In this case, the merchant seamen sued Edward Aldridge, the Secretary of the Air Force, in his capacity as executive agent for the DOD C/MSRB.[315] The seamen represented the interests of two Merchant Marine groups that served in combat zones during World War II.[316] The DOD C/MSRB denied the seamen's application for veteran status in 1982 and 1985.[317]

The Federal District Court for the District of Columbia concluded "that the criteria set forth in the Secretary's regulations have not been applied even-handedly."[318] The court held that "[b]y making decisions based on unpublished criteria, the Secretary frustrated the purpose of the implementing regulations and denied

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[311] 10 U.S.C. § 106. ***See*** *also* S. REP. NO. 95-468, 95th Cong., 1st Sess. 3 (19771, *reprinted* in 1977 U.S.C.C.A.N.3747,3920.

[312] *See* G.I. Bill Improvement Act, *supra* note 13, § 401(a)(1) (emphasis added).

[313] *Id.*

[314] *See* VA BENEFITS, *supra* note 306, at 35.

[315] Schumacher v. Aldridge, 665 F. **Supp.** 41 (D.D.C. 1987).

[316] *Id.* at 51.

[317] *Id.*

[318] *Id.* at 55.

plaintiffs a fair opportunity to present their case."[319] The court compared the service of the Merchant Marine to that of the fourteen successful groups.[320] The court found that "at least one of plaintiffs applications satisfied the relevant, published criteria to an equal or greater extent than some successful groups."[321]

In making its comparison, the court found that the military subjected the Merchant Marine to military justice—i.e., its members were not free to abandon a voyage once underway; they received military training; and they performed a unique wartime mission.[322] As a result of the court's ruling, the DOD C/MSRB revised its rules and submitted them for public comment in 1989.[323]

3. The Revised Rules—The proposed rules incorporated the recommendations of public comment.[324] The amended rules broaden the opportunities for contractor employees to claim veteran status and provide further insight into government policy concerning the concept of assimilation to the armed forces.

As a result of one comment, the DOD C/MSRB rules added criteria that stated contractor employees may gain veteran status if

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[319] *Id.* at 54.

[320] *Id.* at 44 (publishing the court's extensive findings).

The successful applicants have been:

(1) Women's Airforces Service Pilots (WASPs)(WW II) (3/8/79);

(2) Signal Corps Female Telephone Operators Unit (WW I) (5/15/79);

(3) Engineer Field Clerks (WW I) (8/31/79);

(4) Women's Army Auxiliary Corps (WAAC)(WW II) (3/18/80);

(5) Civilian Employees; Pacific Naval Air Bases, who actively participated in the defense of Wake Island during WW II (1/22/81);

(6) Quartermaster Corps Female Clerical Employees Serving with the American Expeditionary Forces (WW I) (1/22/81);

(7) Reconstruction Aides and Dieticians in WWI (7/6/81);

(8) Male Civilian Ferry Pilots (WW II) (7/17/81);

(9) Wake Island Defenders from Guam (WW II) (4/7/82);

(10) Civilian Personnel Assigned to the Secret Intelligence Element of the OSS (WW II) (12/27/82);

(11) Guam Combat Patrol (WW II) (5/10/83);

(12) Quartermaster Corps Keswick Crew on Corregidor (WW II) (2/7/84);

(13) U.S. Civilian Volunteers who Actively Participated in the Defense of Bataan (WW II) (2/7/84); and

(14) U.S. Merchant Seamen who Served on Blockships in Support of Operation Mulberry in the Normandy Invasion (WW II) (10/18/85).

Id.

[321] *Id.* at 55.

[322] *Id.*

[323] *See* 54 Fed. Reg. 39,991 (1989) (to be codified at 32 C.F.R. pt. 47) (proposed Jan. 30, 1989).

[324] *Id.* at 39,992.

they "assimilated to the armed forces, as reflected in treaties, customary international law, judicial decisions and U.S. diplomatic practice."[325] Thus treatment as a "technical representative" under a SOFA, classification as a "prisoner of war" by enemy forces, and submission to the "foreign criminal jurisdiction'' regime of *AR* 27-50 provide indicia that deployed contractor employees have "assimilated to the Armed Forces of the United States."[326]

Interestingly, the board adopted two commentators' suggestions that "a distinction should be made between 'persons serving with' and those 'accompanying' an Armed Force in the field."[327] The board noted "only those 'serving with' an armed force were, in practice, subject to military justice and other forms of military control."[328] However, the board makes "subjection to military discipline" a separate criterion from "subjection to military justice."[329]

The revised rules establish bright line criteria which demonstrate that, under modern conditions of deployment, civilian contractor employees assimilate to the armed forces. This article evaluates whether contractor employees assimilate to the armed forces under the terms of government contracts.[330]

C. Scenario Revisited

Under the previous scenario, the helicopter technician may have assimilated to the armed forces because the armed forces attempted to integrate him through disciplinary controls, uniform issue, and provision of basic life support. However, modern deployments indicate that the government will make a stronger effort to

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[325] *Id.* (reciting comments concerning new rules affecting DOD C/MSRB evaluation criteria).

> Another commentator . . . propos[ed] a subsection instructing the C/MSRB to take cognizance of the effect, if any, that international law in effect at the time of the group's service could have had on the group. . . . [W]e did concur with this latter suggestion and, as a result, amend paragraph D.2 to add: "c. Status of the Group in International Law. In addition to other factors, consideration will be given to whether members of the group were regarded as civilians, *or assimilated to the armed forces, as reflected in treaties, customary international law, judicial decisions and U.S. diplomatic practice.*

Id. (emphasis added).

[326] *See* 32 C.F.R. §47.4(b)(3) (discussing criteria under international law concerning assimilation). "[Clonsideration will be given to whether members of the group were regarded and treated as civilians, *or assimilated to the Armed Forces* as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice." *Id.* (emphasis added).

[327] *See* 54 Fed. Reg. 39,993 (1989) (to be codified at 32 C.F.R. pt. 47) (proposed Jan. 30, 1989).

[328] *Id.*

[329] *Id.* at 39,994.

[330] *See* DOD DIR. 1000.20 (1989), *supra* note 304.

integrate the technician under stricter training requirements and life support arrangements. Consequently, contracting officers should notify contractors of potential site conditions. The following scenario reflects deployment conditions that the helicopter technician would find under the AMC's strategic LSE concept.

Imagine that the technician survived the armed conflict of 1990. He is still employed as a helicopter technician for the same defense contractor. A crisis erupts in **1997.**

However, this time he is prepared to deploy. As part of his employment contract, his employer informed him that he will deploy with the Army in future contingencies. The technician signed a Statement of Understanding informing him of the conditions that he will find in the field. As part of his employment contract, he trained with Army forces on exercise.[331] He learned the Code of Conduct for Members of the Armed Forces.[332] The Army instructed him in the law of war.[333] The unit that he supported trained him on the weapons range.[334] His employer informs the Logistics Assistance Office that he is deployable.[335] As a result, government planners maintain his personal data to facilitate his travel on government aircraft.

The technician reports to Aberdeen Proving Ground for predeployment processing.[336] The Army issues him a Geneva Convention and a military identity card[337] and an official passport.[338] The

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[331]*See* AR 700-137, *supra* note 33, para. 3-2c(2). "Contractors should be involved in exercises to develop the skills needed in an actual wartime situation." ***Id.***

[332]*See* Code of Conduct, *supra* note 60.

[333]*See* AMC GUIDE, *supra* note 271, at 41.

[334]*Id.* at 25. "Weapons training is the responsibility of the home station commander; however, in those instances where the training cannot be given at the home station, the Aberdeen Proving Ground Processing Center will provide weapons familiarization training . . . ." ***Id.***

[335]*See* AR 700-4, *supra* note 32, para. 5-7.

[336]*See* AMC GUIDE, *supra* note 271, at 17.

> The Commander, U.S. Army Materiel Command, has designated Aberdeen Proving Ground (APG), as an installation subordinate to the U.S. Army Test and Evaluation Command, as the Central Departure Point for the processing and deployment of AMC personnel (civilian, military and contractor) deploying forces from CONUS in support of, or as part of, the LSE.

Id. See *also* Toler, *supra* note 95, at 4 (describing developing doctrine concerning deployment of AMC employees and attached contractor personnel). "To help ensure consistency of treatment and processing, all AMC civilians will deploy through the central departure point at Aberdeen Proving Ground." ***Id.***

[337]*See* AMC GUIDE, *supra* note 271, at 17.

[338]*See* 22 C.F.R. § 51.3(b).

Army introduces him to a government civilian who will manage the LSE in the field.[339]

The Army buses him to Dover Air Force Base, Delaware.[340] He joins soldiers on an Air Force C-17 destined for the theater of operations.[341] However, this time, on arrival in the theater of operations, the host nation authorities do not delay him for lack of credentials.[342] Further, the PX manager does not bother him at the checkout line. The Army provides for his room and board through the LSE. In the field, the commander issues a General Order that imposes a curfew, requires wear of the uniform, and sets forth standards of conduct for all members serving with the armed forces. As far as the unit commander is concerned, the technician looks like a soldier and shares the same hardships as other members of his command.[343] Does the technician hold military status? The following subpart will analyze this question.

D. Application *of* the New Rules

The following discussion will apply the DOD C/MSRB rules to the case of the deployed technician.

1. Threshold requirements—The board considers veteran status applications only if the applicant meets the following five threshold criteria.

a. Similarly Situated—The organization must be a "civilian or contractual group similarly situated" to the WASPs.[344] The Army attached our helicopter technician to an AMC LSE which is a specialized organization designed "to bring the power of the national support base to bear in a wide range of contingencies anywhere in the world."[345] The analysis requires a finding that the individual

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[339] *See* Toler, *supra* note 95, at 5:

> The misunderstandings and unclear lines of authority identified during the Gulf War demonstrate the importance of command and control of civilians deployed to support military operations. Deployed civilians will now be temporarily detailed to the LSE for command and control and will report directly to the intheater chain of command.

Id.

[340] *See* Schandelmeier, *supra* note 51, at 34 (describing Aberdeen Proving Ground's central processing point experiment during the Gulf Conflict).

[341] *See* AIA Memo, *supra* note 7, at 5 ("Contractor personnel should be granted official government travel status . . . .").

[342] *Id.*

[343] *See* AMC GUIDE, *supra* note 271, at 33 ("during major deployments, most individuals will be living under field conditions.").

[344] 32 C.F.R. § 47.4(a)(1).

[345] *See* Jon M. Schandelmeier, The *Logistics Support* Element, ARMY LOGISTICIAN, July-Aug. 1994, at 18.

was a member of group which—like the WASPs—provided services directly to the armed forces. The unique purpose of contractual groups attached to the LSE may qualify under this threshold.

b. Service to the United States—The performance of government contract "to provide direct support to the U.S. armed forces" satisfies this requirement.[346]

c. Armed Conflict—The applicant must have served during an "armed conflict."[347] The board excludes short-term deployments such as the Grenada intervention of 1983, the Lebanon incursion of 1958, and the 1965 incursion into the Dominican Republic. As part of their analysis, contracting officers should assume that all deployments could qualify as an armed conflict. Because the contractor agreed to deploy its technician, knowing that the contingency could be classified as an "armed conflict," the contractor and employee are on notice of the potential for hostilities.

d. Living Members *of* the Group—The technician and similarly situated employees of the contractor must survive the experience to seek DOD C/MSRB certification.[348] The contracting officer must assume that the military will safeguard the contractor employee and that he will survive the deployment. As a result, the employee may seek veteran status.

e. Nonreceipt *of* Other Federal Benefits—The contractor would pay its employee benefits as specified under their contract. No government benefits directly accrue to the contractor employee if he were to be taken prisoner or held hostage, unless his employee or insurer reneged on contracted for coverage.[349] At time of contract performance, the technician received no other benefits from the government outside of contract. Thus, he meets the threshold for contract purposes. If he received benefits as a result of hostage taking or terrorism legislation,[350] the DOD C/MSRB may disapprove of this action.[351]

2. Determination *of* Active *Duty Equivalency*—Once the threshold requirements are satisfied, the DOD C/MSRB evaluates the circumstances under which civilian contractors rendered service to the armed forces.

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[346]32 C.F.R. § 47.4(a)(2).

[347]*Id.* § 47.4(a)(3).

[348]*Id.* § 47.4(a)(4).

[349]*See* **FAR,** *supra* note 3, 52.22-4 (Worker's Compensation and War-Hazard Insurance Overseas).

[350]*See* 22 C.F.R. pt. 191 (Hostage Relief Assistance).

[351]32 C.F.R. § 47.4(a)(5).

a. Uniqueness *of* Service—Applicants must show how their organizations differed from a peacetime organization not in a combat zone, or how the "wartime mission was of a nature to substantially alter the organization's prewar character."[352] The employee's attachment to the LSE, submission to a field commander's authority, and that the government issued a contract modification to fulfill a combat contingency indicates unique service.

b. Organizational Authority over the Group—The Army's designation of the site of performance, and attachment of the technician to the LSE in a combat zone, supports a showing of United States military control over the contractor employee.[353]

c. Integration into the Military—The Army issued the technician a uniform, chemical protective gear, and an identity card. Further, the technician served under the umbrella of the LSE. Under these conditions, the Army integrated the technician into its military structure.[354]

d. Subjection to Military Discipline—The field commander regulated the technician's behavior on and off duty via a General Order. Because the guidance included severe administrative penalties—revocation of travel privileges—the technician felt obliged to obey the rules. The restrictions on movement, standards of dress, and liberty tend to show military control.[355]

e. Subjection to Military Justice—Even though this deployment is not "time of war," absence of military justice jurisdiction does not render the technician completely independent of the Armed Forces of the United States.

f. Prohibition Against Members *of* the Group Joining the Armed Forces—Military "emergency-essential" designations require civilians to abandon their reserve military capacities to meet con-

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[352] *Id.* § 47.4(b)(1)(i)(A).

[353] *Id.* § 47.4(b)(i)(B).

[354] *Id.* § 47.4(b)(iii) (discussing how civilians integrate into the United States Armed Forces).

> Integrated civilian groups are subject to the regulations, standards, and control of the military command authority.
>
> (Ai Examples include the following: . . .
>
> (2) Wearing military clothing, insignia, and devices.
>
> (3) Assimilating the group into the military organizational structure . . .
>
> (4) Emoluments associated with military personnel; i.e., the use of commissaries and exchanges, and memberships in military clubs.

Id.

[355] *Id.* § 47.4(b)(iv).

tract requirements.[356] Our technician would have signed an agreement with his employer indicating that he would resign his reserve status to fill the current position. Performance is sufficient to show compliance under this section.[357]

g. Receipt *of* Military Training *and/or* Achievement *of* Military Capability—Our contractor would have processed through the AMC processing center at Aberdeen Proving Ground. At Aberdeen, he would have received military training to meet the military mission. The Army's AMOPES requires predeployment training that enhances the contractor's capabilities as a member of a military team. The achievement of military capability is a condition precedent to deployment under contract: Army fitness criteria may appear as part of the requirements.[358]

3. Status *of* Group in International Law—"Civilians accompanying the force" as technical representatives are valid military targets.[359] If captured, they are considered "prisoners of war" and not civilians in the general population who must be repatriated. Because the Army issued a Geneva Convention identity card to the technician granting him assimilated rank for the purposes of the convention, he is part of the Armed Forces of the United States.

Additionally, if detained by host nation authorities, the technician would fall under the foreign criminal jurisdiction regime established by the Armed Forces of the United States regulation.[360] Under this regime, the Army legal liaison authority assumes responsibility for visiting the technician in prison, observing his trial, and, if authorized, contracting for the costs of his legal defense.[361] In this manner, the Army should consider the technician assimilated to the armed forces as a result of "U.S. diplomatic practice."[362]

4. Conclusion—The inescapable conclusion is that, under DOD C/MSRB criteria, the technician's conditions of deployment convert him from a "pure civilian'' into a military asset. The Armed Forces of the United States have woven the contractor employee into the

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[356] *See, e.g.,* DOD INSTR. 3020.37, ***supra*** note 71, para. F8 (describing requirements for contractors to replace employees having reserve military commitments). "Ensure that contractors providing essential services identify their employees having military mobilization recall commitments and have adequate plans for replacing those employees in the event of mobilization . . . .") *Id.*

[357] 32 C.F.R. § 47.4(b)(vi).

[358] *Id.* § 47.4(b)(vii).

[359] *See* Parks, ***supra*** text accompanying note 221.

[360] *See* ***generally*** AR ***27-50, supra*** note 239.

[361] *See* ***id.*** para. 2-5; ***see also*** 10 U.S.C. § 1037 (as amended).

[362] 32 C.F.R. § 47.4(b)(3).

fabric of the military organization in the field. While the contractor must perform his duties independently of direct government oversight, his conditions of deployment characterize him as a government official. To make this conclusion palatable to contractors, the armed forces must educate them. The following section outlines *DFARS* notice provisions that accomplish this goal.

VI. The Proposed Solution

A. *Overview*

This article has shown that the relationship between the Armed Forces of the United States and the civilians who serve with the forces, although interwoven, is often characterized by envy and mistrust.[363] The nature of government procurement fosters the dichotomy: the government needs contractors' services, but it may not interfere with their independence.[364] The solution lies in providing notice of this interwoven relationship to contractors in government solicitation clauses.

One of the purposes of a solicitation for services is to place the prospective contractor on notice of government requirements and site conditions.[365] Therefore, when site conditions include the possibility of combat, the contractor must select employees who can per-

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[363] *See* WALT REPORT, *supra* note *58,* at F-93 (reprinting the comments of a senior judge advocate). **"As** a young officer in Vietnam I was appalled by the personal behavior and ill discipline, both morally and legally, of "legions" of civilian government employees and civilian contractors. That despicable display was worsened by the realization of the vast pay differential between uniformed personnel and civilians."

[364] *See, e.g.,* AR 700-4, *supra* note 32, para. 5-3g ("Contractor personnel will be under the supervision and control of their companies."). But *see* AR 700-137, *supra* note 33, para. 3-d(2) (reciting exceptions that may be provided under acquisition rules).

> Contractor employees will not be under the direct supervision or evaluation of military or Department of the Army (DA) civilians *except as provided by* ***FAR,*** *DFARS, and the AFARS.* The contractor will provide the supervisory and management personnel for each contract as well as on-site liaison with functional U.S. organizations.

Id. (emphasis added).

[365] *See* FAR, *supra* note 3, 52.237-1 (site inspection requirements).

> Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably available. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

Id.

form under those conditions.[366] Unfortunately, few contractors are likely to understand the full ramifications of deploying employees in the field. The contractor needs more guidance than currently found in the *DFARS*.[367] A better educated contractor is a better performer.[368]

The following paragraphs describe modest changes to the *DFARS*—set forth at the Appendix—that clarify the government/contractor relationship, and provide for realistic expectations for the United States citizen contractor employee serving with the armed forces in the field.[369] Subsequent sections analyze the merits of these proposed provisions and explain why immediate implementation is warranted.

B. Acquisition Planning

The acquisition plan is the first step in planning for deployment of civilian contractor employees.[370] Commands must adopt an interdisciplinary approach to acquisition planning.[371] In this way, commands can anticipate the needs of its contractor employees who deploy in the field. The acquisition plan is not limited to commands that require LOGCAP infrastructure, or Logistics Assistance Program services overseas.[372] The plan extends to any command that requires maintenance or support services beyond its core capa-

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[366] *See* DOD INSTR. 3020.27, *supra* note 71, para. D.2. "Contractors providing services designated as essential by a DoD component are expected to use all means at their disposal to continue to continue to provide such services, in accordance with the terms and conditions of the contract . . . ." *Id.*

[367] *See, e.g.,* Schandelmeier, *supra* note 51, at 34. "There is no standard war clause in contracts obligating contract personnel to remain during hostilities." *Id.*

[368] *See, e.g.,* Toler, *supra* note 95, at *6* (advocating the merits of the AMC GUIDE, *supra* note 271).

[369] *See* Toler, *supra* note **95,** at 4 (reflecting on findings submitted pursuant to an interdisciplinary AMC task force concerning the use of AMC civilians—but applicable to contractor employees). "There is a general lack of awareness of the expectations of the civilian work force, from both civilian workers and management-leadership. . . . There is a void within Army warfighting and support doctrine on the use of civilians." *Id.*

[370] *See* DFARS, *supra* note 10, 207.103(c)(i), exhorting the value of acquisition plans as follows:

> (c)(i) Military departments and agencies shall prepare written acquisition plans for —
>
> (C) Any other acquisition considered appropriate by the department or agency.

Cf. AR 700-137, *supra* note 33, para. 2-2 (describing advanced acquisition planning imperatives for LOGCAP contracts).

[371] *See generally* Toler, *supra* note 95, at 3 (describing the AMC's multidisciplinary team that assessed civilian deployment issues).

[372] *See generally* AR 700-4, *supra* note 32; *see also AR* 700-137, *supra* note 33.

bilities. Therefore, the following paragraphs discuss amendments to the acquisition planning process.

1. Amend DFARS Subpart 207.105—Written acquisition plans evidence a commander's intent.[373] Subpart 207.105 of the *DFARS* should reflect the possibility that contractor employee/representatives will deploy with the requiring activity.

The proposed provisions, labeled as additions to the Plan of Action, force contracting officers to coordinate with both the planners and operators through a Contract Officer Representative (COR) at the unit level.[374] The theory is that, before a crisis erupts, the Operations Officer, Logistics Office, and Adjutant General identify civilian employees who may deploy with the force. Constant communication with the contractor ensures that it can comply with the terms of contract when its employees are required to deploy in the field.

2. *Train* the Contracting Officer—Another purpose of the proposed revision is to educate the contracting officer about the rights and duties of contractor employees in the field. In 1993, key planners found that targeting of deployed contractor civilians was a controversial issue.[375] During Operation Desert Shield and Storm, contractor employees failed to understand their legal status.[376] Therefore, command legal advisors must sensitize their contracting officers to civilian status issues. In this way, contracting officers will be prepared to inform contractors of their rights and obligations under the service contracting provisions that are discussed in the following sections.

C. Service Contracting Changes

The service contract identifies the requirements for contractor employees in the field.[377] However, the requirement could manifest itself in construction and supply contracts.[378] Therefore, in a construction contract, the requirement may be met as a service line

[373] *See* DFARS, *supra* note 10, 207.105.

[374] *See id.* 207.105.

[375] *See* Toler, *supra* note 95, at 4. "Another controversial issue is the international status of civilians who deploy to support military operations." *Id.*

[376] *See* DSAT REPORT, *supra* note 4, § III.F ("some civilians were confused about their status . . . even though the employees wore desert camouflage uniforms and had protective gear and weapons").

[377] *See generally* DFARS, *supra* note 10, pt. 37.

[378] *See* FAR, *supra* note 3, pt. 36.

item, through an independently priced contract line item number (CLIN).[379]

The Appendix to this article establishes seven additional clauses, including one form, that amend the service contracting portion of the *DFARS*.[380] The Statement of Understanding provides contractor employees actual notice of the unique circumstances of service in the field.[381]

1. Contingency and Deployment Services—This clause captures the essence of twenty-first century DOD military doctrine.[382] The clause's five subparts articulate DOD policy towards contractor employees and serve as an introduction to the conditions of deployment facing contractor employees in the field. It sets the stage for seven notice provisions that follow the clause.

a. Scope—This subpart informs all contractors of the unique site conditions that their employees may encounter in the field.[383]

b. Policy—The policy statement informs contractors of the Armed Forces of the United States interest in managing civilians in the field. This policy statement intends to make contractor employees part of the total force package that deploys in the field.

c. *Definitions*—This subpart establishes the meaning of the terms "in the field," "chain of authority," and "life support organization." These terms inform the contractor that its employees may be integrated into the armed forces through an activity such as the LSE.

d. *Procedures*—This subpart forces the contracting officer to participate in deployment planning. It requires the contracting officer to notify the contractor of the rights and obligations of its employees in the field. The contracting officer must obtain a Statement of Understanding from contractor employees designated to perform the contract in the field. The contracting officer must notify coordinating agencies of designated contractor employees to facilitate mission planning requirements.

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[379] *See* DOD Dir. 4205.2, *supra* note 34, para. 3a. The "CAAS should be procured through a separate contract action, of possible. When [the] CAAS is a portion of a contract action, it shall be a separately identified contract line item number and separately priced.") *Id.* **See** *also* DFARS, *supra* note 10, 237.7002(a) ("every contract calling for engineering and technical services . . . shall show those services as a separate and identifiable line item separately priced.")

[380] *See* DFARS, *supra* note 10, pt. 237.

[381] *See* FAR, *supra* note 3, 52.237-1 (Site Visit).

[382] *See* ARMY FOCUS, *supra* note 61.

[383] *See* FAR, *supra* note **3,** 52.237-1 (Site Visit).

e. Contract Clauses—This subpart identifies mandatory contract clauses for solicitations requiring contractor employee services in the field. This subpart serves as a checklist for the contracting officer to ensure deployment contracts have appropriate clauses.

Now the stage is set for the discussion of substantive notice provisions.

2. Notice Provisions—Seven substantive notice provisions alert contractors to unique requirements of service in the field.

a. Status Under International Law—This subpart informs contractors about the legal status of their employees in the field. Contractor employees gain the protection of international law once accredited to the Armed Forces of the United States.[384] Although classified as "noncombatants" under the Hague Regulations,[385] contractor employees are legitimate objects of attack.[386] The precise status of contractor employees, as members of the armed forces, is not settled under international law.[387] However, the notice provision asserts that they may be considered combatants by enemy forces. Nevertheless, under United States practice, contractor employees are never deliberately used as belligerents or placed in danger.[388]

Contractor employees who perform exclusively medical or religious services may acquire Retained Status as protected personnel in the field.[389] Further, the clause informs contractors that their employees do not lose protections under international law when

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[384] *See, e.g.,* GPW-49, *supra* note 1, art. 4A, 6 U.S.T. at 2230.

[385] Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 3, 36 Stat. 2277, 2296, T.S. 539, 1 Bevans 631 (entered into force Jan. 26, 1910).

[386] *See* W. Hays Parks, *supra,* note 221, at 131.

[387] *See* PROTOCOL COMMENTARY, *supra* note 1, at 515 ("A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of the hostilities. . . ."); but *see id.* at 579 (discussing whether contractors could be classified as mercenaries under Protocol I to the Geneva Conventions).

> Only a combatant, and a combatant taking a direct part in hostilities, can be considered as a mercenary in the sense of Article 47. Consequently this condition excludes foreign advisors and military technicians . . . [a]s long as these experts do not take any direct part in the hostilities, (citation omitted) they are neither combatants nor mercenaries, but civilians who do not participate in combat.

Id.

[388] *See* AR 700-137, *supra* note 33, para. 3-2d(5) (reciting Army policy to keep contractors out of combat areas). "Contractors can be used only in selected combat support and combat service support activities. They may not be used in any role that would jeopardize their role as noncombatants." *Id.*

[389] *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 23, 6 U.S.T. 3114. 75 U.N.T.S. 31 (entered into force Feb. 2, 1956).

commanders arm them. This clause serves to allay misunderstandings during predeployment training that may include weapons familiarization.

The clause also informs contractors that the armed forces must confer assimilated rank on United States citizen employees serving in the field.[390] It accredits contractor employees to the Armed Forces of the United States under international law.[391] As a result, contractor employees have a right to prisoner of war status on capture by enemy forces.[392]

b. Notice of Duty to Abide by the Code of Conduct for Members of the Armed Forces—The corollary to notice of status under international law is notice of Code of Conduct requirements. This subpart alerts contractors to the possibility that their employees may be captured in the field. Accordingly, this subpart informs the contractors of the behavior expected of members of the armed forces when captured.[393] Because contractor employees attain prisoner of war status, they clearly assimilate to the armed forces on capture: they have relative rank; wear uniform; and are accorded full protection of international law. Therefore, contractor employees should, under terms of contract, abide by the Code of Conduct. In this way, the Armed Forces of the United States take an important step in integrating contractors to the total force in the field.

c. Notice of Attachment to a Life Support Organization—This provision informs the contractors of the level of support that their employees will receive in the field. This provision forces the contracting officer to coordinate with the appropriate plans and operations personnel who decide how to support the civilian employee in the field. This provision recognizes that a variety of diverse schemes exist to support contractor employees in the field; for example, the AMC's LSE or the DLA's DCST. The provision serves as a planning tool so that all parties to the contract can anticipate the general conditions of deployment.

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[390] *See* **DOD** INSTR. 1000.1, *supra* note **226,** para. VI, establishing relative rank for civilian contractors as follows:

> Military-Civilian equivalent grade relationships have been developed to conform with the rank categories prescribed in Article 60, GPW, for monthly advances to prisoners of war, and to facilitate treatment of prisoners of war with due regard to rank in keeping with Article 43, GPW . . . .
>
> . . . .
>
> B. The rank equivalencies do not convey to civilian personnel rank or authority over military personnel.

[391] *See* GPW-49, *supra* note 1, art. 4A(4).

[392] *Id.*

[393] *See* Code of Conduct, *supra* note 60.

d. Notice *of* Obligations in the Field—This clause informs contractors that their employees must follow the administrative rules and regulations of the field commander.[394] This provision enhances the authority of the field commander over civilians. All personnel deployed to the field face adverse administrative action for violation of commander's policy.[395] Depending upon the field environment, the commander's sanctions, although limited, can severely impact the contractor and its employee.[396]

The clause also serves to reinforce predeployment training requirements. This training reinforces the standards of behavior expected of civilian employees in the field.[397] The training is intended as a complement to the employee's duties. This provision serves to implement DOD policy requiring contractors to familiarize themselves with armed forces practices in the field.[398] In this way, contractors learn to anticipate customer needs under realistic conditions.

e. Notice *of* Foreign Legal Jurisdiction Regime—This clause informs contractors that their employees may be subject to foreign legal jurisdiction.399 As a result, statutory protections may attach to contractor employees who find themselves subject to foreign law.[400]

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[394] *See* AMC GUIDE, *supra* note 271, at 33. "The on-site commander may impose special rules, policies, directives and orders based on mission necessity, safety and unit cohesion." *Id.*

[395] *Id.* at 37.

[396] *See* AFARS, *supra* note **31,** 37.7098-1(c), describing travel and transportation sanctions available to the government as follows:

> Travel, transportation, and other costs connected with replacement or reassignment of contractor personnel shall not be reimbursable if the replacement or reassignment was caused by—
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> (1) unsatisfactory performance,
>
> (2) misconduct on or off duty,
>
> (3) security reasons,
>
> (4) voluntary termination of employment by the contractor personnel, or
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> **(5)** voluntary removal by the contractor before the end of the contract period. *Id.*

[397] *See* AMC GUIDE, *supra* note 271, at 37.

[398] *See* AR 700-137, *supra* note 33, para.3-2c(2).

[399] *See* AMC GUIDE, *supra* note 271, at 35.

[400] *See* 10 U.S.C. § 1037 (reciting congressional intent for the armed forces to provide for contracted legal services to all civilians accompanying the armed forces).

> (a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice *and of persons not subject* to the Uniform Code of Military Justice *who are employed or accompanying the armed forces* in an area outside the United States
>
> . . . .

The clause informs contractors that approval of their requests for legal services under statute, is a matter of discretion of the Service Secretary.[401] Under DOD policy, the contractor employee must request assistance from the Armed Forces of the United States.[402] Additionally, because the DOD has discretion to refuse the request, the clause emphasizes that responsibility for legal services remains with the contractor.[403]

f. Notice *of* the DOD CIMSRB — This clause informs contractors of the existence of the DOD C/MSRB. The clause places contractors on notice of potential record-keeping burdens concerning their employees. As discussed, the DOD C/MSRB may grant veteran status to contractor employees who have qualifying service with the Armed Forces of the United States in the field.[404] This provision may serve as a bargaining tool for the contracting officer concerning contract costs.

g. Statement *of* Understanding *of* Service in the Field — This provision revives a similar procedure that was used during the Second World War.[405] It also implements the recommendation of the Defense Science Board, avoiding privity of contract problems, yet giving contractor employees adequate notice of site conditions.[406] The most important of the proposed DFARS amendments, the Statement of Understanding reaches the key stakeholder under government contract for services in the field: the contractor employee.

The Statement of Understanding informs the individual contractor employee of the contractual notice provisions agreed to by his or her employer. When signed by the contractor employee, this document serves as evidence of knowing and voluntary submission

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(b) The person on whose behalf a payment is made under this section is not liable to reimburse the United States for that payment, unless he is responsible for forfeiture of bail . . . .

Id. (emphasis added).

[401] *See AR* 27-50, *supra* note 239, para. 2-2d.

[402] *Id,*

[403] *Id.* para. 2-2d (setting forth the procedure for foreign criminal jurisdiction funding of contractor personnel); para. 2-c ("funds under 10 U.S.C. 1037 *will not be used to provide legal representation to indirect hire and contractor employees, or* their dependents . . . ."); para. 2-d ("Personnel not eligible under the above criteria may request funds for the provision of counsel and payment of expenses in exceptional cases . . . .").

[404] *See* 32 *C.F.R.* pt. *47.*

[405] *See* FM 30-27, *supra* note 196, para. 8a. "Before final acceptance, such individuals will be required to sign an agreement . . . ." *Id.*

[406] *See* DEFENSE SCI. BD. **REPORT,** *supra* note 193, and accompanying text.

to the administrative control of the armed forces in the field. This is not a contract with the government. This minimal notice safeguards government interests and prevents misunderstandings with contractor employees. Like the agreement used by the Army in 1944, the Statement of Understanding accredits the contractor employee to the Armed Forces of the United States. In case of capture, the statement serves as additional evidence that the employee is entitled to prisoner of war status. Additionally, the Statement of Understanding underscores that the contractor employee could lose life or limb incident to performance of contract in the field.

The Statement of Understanding informs the employee that the government may require the employee to wear a uniform and abide by the Code of Conduct for Members of the United States Armed Forces. This paragraph also serves notice that liability for loss of government-furnished property is remedied by the report of survey system.[407] Additionally, the Statement of Understanding serves notice that if Congress declares war, then the employee is subject to the UCMJ. The employee is not agreeing to submit to the UCMJ by contract: an option not regarded as viable in the 1950s, when statute authorized such action.[408]

The foregoing contractual solutions are the corollary to long-standing historical, doctrinal, and administrative practices of the United States. These practices evidence a custom of assimilating contractor employees into the service of the armed forces. The notice provisions simply consolidate two hundred years of United States military practice in the government's acquisition regulations. Are these clauses justified? The following section argues for immediate promulgation.

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[407] *See AR* 735-5, *supra* note 47, para. 2-5.

[408] *See* Robinson O. Everett, *Military Jurisdiction Over Civilians,* DUKE L. J. 366, 407 (1960) [discussing the Supreme Court's majority opinion in *Reid v. Covert* which sets forth alternatives to courts-martial of civilians).

> The majority's opinion is weakest when it seems to suggest some alternatives. One solution envisaged, and purportedly derived from the case of Ex parte Reed, decided in 1879, would involve the signing by civilian employees of agreements to submit to military jurisdiction . . . .
>
> The difficulty involved here would seem to stem from the concept that although an accused can waive trial by jury with the consent of the prosecution and of the court, he cannot, merely by his consent, create jurisdiction in a court. . . . To give weight to any such agreement would resemble allowing a federal district court to try **a** man for a violation of state law merely because he consented to the trial.

Id. (footnotes omitted).

VII. Impact of Proposed *DFARS* Amendments

A. Introduction

This article has examined extensive precedent supporting the contention that contractor employees hold military status and also has demonstrated that current government contracts are silent on this issue. The government and its contractors lack sufficient knowledge to prepare for "come as you are wars."[409] Consequently, the Armed Forces of the United States, heavily reliant on essential civilian services, are unprepared to meet the challenges of using these civilians during modern military operations. The DAR Council should implement the proposed *DFARS* amendments (as set forth in this article). In this way, government contract clauses will better safeguard government investments in high-technology equipment and the civilians who maintain it.

The purpose of this part is to present an analysis of the proposed *DFARS* amendments. The article analyzed the provisions under DAR Council criteria.[410] In the final analysis, the proposed *DFARS* provisions will give government contractors and their employees notice of potential conditions in the field.

B. Do ***the*** Clauses Address the *Issues?*

The *DFARS* amendments recapitulate the sum of the armed forces' experience with contractor employees in the field and provide basic answers to the issues raised by the DOD, industry, the legislature, and the judiciary. The amendments address the impact of domestic and international law. They answer questions that avoid defects in contract formation—such as whether truly mutual assent exists. The following sections revisit the issues raised in part II of this article.

1. DOD Issues—The proposed *DFARS* amendments address current DOD issues regarding the use of contractor employees during military operations. The DOD acknowledges that it has not provided adequate guidance to deploying contractors.[411] The proposed *DFARS* amendments give contractors notice of predeployment training requirements, alerts them to their status on the battlefield, and advises them of life support arrangements in the field.

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[409] *See* LMI **REPORT,** *supra* text accompanying note 67.

[410] DFARS, *supra* note 10, 201.201-1 (setting forth the criteria that the DAR Council requires to analyze proposed amendments to the *DFARS).*

[411] *See* DOD IG **REPORT,** *supra* note **69.**

Additional internal DOD efforts will implement the government's promise to adequately support contractor employees in the field.[412]

2. Private Sector Issues—The proposed *DFARS* amendments address industry concerns about life support, status, and conditions of employment in the field.[413] The proposed *DFARS* amendments articulate the status of contractor employees under international law, require adherence to the Code of Conduct, and clarify other obligations of contractor employees under terms of contract. Additionally, the proposed amendments force the contracting parties to communicate.

The Statement of Understanding provides the contractor employee with actual notice of conditions and obligations in the field. Furthermore, the Statement of Understanding provides the government with evidence of contractor intent to perform the contract as bargained for. As a result, the government can train and integrate contractor employees before crises occur.

3. Legislative Concerns—The proposed *DFARS* amendments address legislative concerns about core capabilities and personal service contracts.[414] The proposed amendments are drafted as a service contract that fall outside the proscriptions against personal service contracts.[415] The proposed amendments anticipate that contractor employees will serve with the Armed Forces of the United States in the field under the umbrella of a life support organization. As a result, these employees will serve as augmentees to a direct support maintenance or supply activity. In this way, the contractor employees merely supplement the core capability of the armed forces, avoiding charges that contractors have assumed primary responsibility for an inherently governmental task.

4. Judicial Issues—The proposed *DFARS* amendments raise the issue whether contractor employees in the field perform services that are the equivalent of active duty. Under the Schumacher analysis,[416] the DOD's deployment doctrine appears to meet both the threshold and evaluation criteria used by the DOD C/MSRB.[417] Because contracting officers cannot predict the future, they must assume, in preparing their statement of work, that contractor employees serving with the Armed Forces of the United States in

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[412]*See FM* 100-5, *supra* note 6.

[413]*See supra* text accompanying note 7 (AIA Memo).

[414]*See, e.g.,* GAO REPORT B-251383, *supra* note 88; GAO REPORT B-241388. *supra* note 89.

[415]*See* FAR, *supra* note 3, 37.204 (Exclusions) (excluding activities and programs from personal services contract proscriptions).

[416]*See* Schumacher v. Aldridge, 665 F. Supp. 41 (D.D.C.1987).

[417]*See* 32 C.F.R. pt 47.

the field will serve during a period of armed conflict. Consequently, civilian contractor employees hold military status. Both parties to the contract must allocate risk by negotiating appropriate contract type and profit.[418]

Although the proposed *DFARS* amendments may inform contractors about government requirements, implementation poses some problems. The following subpart examines the potential problems implementing the proposed *DFARS* amendments.

C. Implementation Issues

The *DFARS* provisions do not identify specific requirements for deployment. The notice provisions are intended to provide a baseline of knowledge for government and contractor to prepare informed requests for proposals and offers. Are these provisions too general to be useful? The *DFARS* notice provisions do not change the contracting culture that cause the problems in the first place: lack of communication between contracting officer, contractor, and requiring activity. Additionally the provisions may be perceived as another government regulation to burden an overregulated private sector. Finally, legislative enactments could remedy government contract shortfalls: such as designating all contractor employees in the field as members of the armed forces and unilaterally announcing to foreign governments that the United States makes no distinction between soldiers and specified groups of contractor employees serving in the field. The following sections analyze potential problems.

1. Contract Pricing—An immediate concern is whether additional requirements result in higher contract costs. **A** simple economy of scale suggests that making contractor employees use military transportation will save the taxpayer money. The military experience during Operation Desert Shield and Storm shows that deployed contractor employees cost the taxpayer more than government employees.[419] However, proposed *FAR* guidelines would make

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[418] *See* FAR, ***supra*** note 3, subpt. 15.8 (discussing price negotiation).

[419] *See* Memorandum with Survey and Slides from Hugh McNeil, Dep't of Army, Central Region, US. Army Audit Agency, SAAG-CER, subject: Audit Assist Request for Contract Support Costs During Operation Desert Storm, to Director, Logistical and Financial Audits, USA **AAA,** SAAF-LFL (18 June 1993) [hereinafter USA AAA Survey] (obtained January 1995; copy on file with the author and Directorate for Plans and Operations, Office of the Deputy Chief of Staff for Logistics, DALO-PLP, United States Army, Pentagon) (finding that estimated annualized costs for 30 Army contracts deploying contractor civilians to support Operation Desert Shield and Storm ranged between $251,939 and $364,961 per employee versus $167,900 per government employee).

government travel rates the standard measure of travel costs.[420] Additionally, the contracting officer may make government transportation a means of travel under the contract.[421]

Several factors account for the high costs of the Desert Storm experience. These factors should not hinder effective negotiation in the future. These factors included: weak bargaining position; immediate needs for support services that were considered more important than controlling costs; numerous modification and letter contracts; and sole source procurement.[422] As a result, contractors charged up to 130% for hazard duty pay allowances for their employees' services.[423] The contracting officer, using appropriate clauses, can control these costs. For example, an interim *DFARS* rule limits contractor personnel compensation to $250,000 per year.[424]

Contracting officers may avoid excessive charges through acquisition planning.[425] Contracting officers must use their business judgment to strike the best deal for the government.[426] Contracting officers should determine appropriate cost savings realized by deploying contractor employees in the field and adjust contract prices accordingly.[427]

2. Contract Formation—Does the contracting officer enter into a multi-year contract or renegotiate every year? Should the contracting officer negotiate, or simply use sealed bidding? What about contract type? The nature of the operation will dictate the contracting officer's options.

As a general rule, the contracting officer should use the negotiated method of contracting.[428] This method gives maximum flexibil-

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[420] *See* FAR Case 94-753, Proposed Rule, 59 Fed. Reg. 64,542 (1994), ***reprinted in*** 10 Gov't Cont. Rep. (CCH) ¶ 99,959 (proposing amendments to *FAR* 31.205-46).

[421] *See AFARS*, ***supra*** note 31, 37.7098-1(a) (requiring use of government travel).

> Government-furnished transportation for contractor personnel, their baggage and equipment shall be used by the contractor for initial travel from its facility to the site of work, for travel on official business between sites of work, and for terminal travel from the site of work to the contractor's facility.

Id.

[422] *See* USAAAA Survey, ***supra*** note 419.

[423] *Id.*

[424] *See* DFARS Interim Rule, 60 Fed. Reg. 2330 (1995), ***reprinted in*** 9 Gov't Cont. Rep. (CCH) ¶ 99,980 (limiting costs for individual compensation on defense contracts to $250,000).

[425] *See* DFARS, ***supra*** note 10, 225.802-70.

[426] *See* FAR, ***supra*** note 3, 1.602-2 (reciting the responsibilities of contracting officers, "contracting officers should be allowed wide latitude to exercise business judgment").

[427] *See* AL 94-6, ***supra*** note 256, para. 2c, app. A, § IX.

[428] *See* FAR, ***supra*** note 3, pt. 15 (Contracting by Negotiation).

ity to the contracting officer who may award a contract with or without discussions.[429] The contracting officer should identify deployment requirements as a separate CLIN.[430] Contract type, based on historical practices dating to Second World War base construction in the Pacific, suggests that Cost-Plus-Fixed-Fee contracts are appropriate.[431] The contracting officer must use good judgment determining contract type: even a Firm-Fixed-Price contract could be appropriate.[432] Although multi-year contracts for services in the field are prohibited,[433] in a crisis, agency heads can approve multi-year contracts on an interim basis.[434]

Assuming that the military will clothe, feed, house, and transport contractor employees under the umbrella of a life support organization, the contractor will incur few direct costs. Thus, the contracting officer can dramatically reduce per diem costs for contractor employees assimilated to the armed forces by making a reasonable allocation of risk to both the government and contractor.[435] Therefore, the notice provisions give the parties to the contract additional information that they can use to allocate risk. Additionally, the cost-benefits associated with the notice provisions, save both the government and contractor the excessive costs of default when an employee leaves the operation prematurely. The notice provisions guard against hiring the faint of heart—and may even encourage the more adventurous employee to seek a unique employment opportunity that could result in rewards for good citizenship. The objective of the clauses is to deter the timid and remind contractors of the inherent risks associated with service in the field.

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[429] *See id.* 52.215-16(c) (Contract Award) ("The Government may award a contract on the basis of initial offers received, without discussions . . . ~").

[430] *See* DFARS, *supra* note 10, 237.203(d)(ii)(A) (outlining the procedures for obtaining contracted field services as an exception to personal service contract procedures—"[slhowthose services as a separately priced line item . . . .").

[431] *See* FAR, *supra* note 3, 16.306 (discussing the requirements for using Cost-Plus-Fixed-Fee Contracts).

[432] *See id.* 16.103(a) (describing the contracting officer's flexibility in determining contract type). "Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Negotiating the contract type and negotiating prices are closely related and should be considered together." *Id.*

[433] *See* **generally** DFARS, *supra* note 10, 237.106 (discussing the one-year limitation on service contracting).

[434] *See id.* 237.203(d)(iii) (discussing contract field service contracts). "Agency heads may authorize personal service contracts for contract field services to meet an unusual essential mission need. The authorization will be for an interim period only." *Id.*

[435] *See FAR, supra* note 3, 16.103(a) (describing allocation of risk during contract type and price negotiations). "The objective is to negotiate a contract type and price (estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance." *Id.*

3. CAAS Issues—Every governmental agency must maintain a core capability to accomplish its mission.[436] When the requirements for mission success exceed an agency's core capability, the agency may hire contractors to accomplish the mission.[437] In the case of the Armed Forces of the United States, the decision to hire civilian combat service support contractors is a result of a conscious policy to improve combat power over logistical capability.[438] Does this policy violate the rule against contracting out inherently governmental functions? The Armed Forces of the United States maintain residual capabilities in its reserve force structure—hiring contractors to perform reserve missions, may be the only alternative under statutory impediments to activating the Army Reserve.[439]

Does the policy violate prohibitions against hiring "quasi-military armed forces"?[440] Although the Armed Forces of the United States may grant veteran status to civilian contractors serving with the forces in the field, the policy does not violate the rule against hiring para-military forces. The Armed Forces of the United States are contracting for supply and maintenance services, not combatant services. Therefore, it follows that contracts for civilian combat service support functions do not violate regulatory proscriptions.[441]

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[436] *See* DEP'T OF DEFENSE, OFFICE OF THE UNDER SECRETARY FOR DEFENSE, (ACQUISITION), GUIDE TO CONTRACTED ADVISORY & ASSISTANCE SERVICES, para. 2.3 (3 Apr. 1992) (reciting the concept of core capability).

> While some functions/tasks are inherently governmental, many others are candidates for contracting out. When making these determinations, requiring activities should keep in mind that whether the Government does its job with its own employees or by contract, it must have a *core capability*. Core capability includes: (1) a sufficient number of trained and experienced Government staff to properly manage and be accountable for its work; (2) maintaining a capability to write and/or administer related service contracts; and (3) retaining a residual capability to perform certain complex service requirements in emergency situations.

Id.

[437] *Id.*

[438] *See supra* text accompanying note 67 (DOD Title V Report).

[439] *See generally* 10 U.S.C. §§ 12301-12321 (superseding previous law codified at 10 U.S.C. §§ 673-687 and continuing the limitation on the conditions and numbers of reservists whom the President may call to active duty); *see also id.* § 671 (prohibiting overseas deployment of any member of the armed forces who has not completed basic training, and during time of war or national emergency, of not less than twelve weeks duration).

[440] *See* 5 U.S.C. § 3108 (prohibiting the government from hiring "Pinkerton Detective Agencies or similar organizations"); *see also* FAR, *supra* note 3, 37.109 (services of quasi-military armed forces).

[441] *See* FAR, *supra* note 3, 37.204 (excluding several types of routine engineering, maintenance, and supply operations from the general proscriptions against personal services contracts).

Although field services contemplated by this article appear proper under acquisition regulations, the government does not implement these services efficiently.[442] The Office of Management and Budget found that CAAS problems occurred as a result of four deficiencies: (1) inarticulate requirements; (2) inflexible contracting rules; (3) lack of coordination between the Contracting Officer and the COR; and (4) poor contract administration practices.[443] Therefore, contracting officers must expend greater effort to ensure field services are properly performed. The proposed DFARS amendments provide base guidance so that contracts properly reflect government base requirements for contractor employee services in the field.

D. Collateral Issues

The public must have an opportunity to comment on the proposed rules. The public, and private contractors, have a vested interest in shaping rules governing contractor employees in the field.

1. Paperwork Reduction ***Act*** Issues — The proposed rules increase the burden on both the government and the private sector to maintain information.[444] The Office of Management and Budget must approve the Statement of Understanding.445 The proposed forms issued incident to contract is the least burdensome method of identifying contractor employees who are selected for service with the armed forces in the field.[446] The information collected is a method of ensuring contract performance during crisis. In this way, the form implements DOD Instruction 3020.37.447

Some redundancy is necessary for contingency planning.[448] The information obtained from the Statement of Understanding does not unnecessarily duplicate information held by the contractor[449] and will actually enhance performance. For example, operations officers can use the data to ensure that contractor employees fly on certain aircraft to reach their supported units. In this way, the contractor performs the contract, at the right place, on time, and the taxpayer does not have to absorb the cost of commercial travel.

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[442] *See* OMB Report, *supra* note 92 and accompanying text.

[443] *Id.* at **5.**

[444] Paperwork Reduction Act, 31 U.S.C. § 1111; *See* also ***5*** C.F.R. pt. 1320.

[445] *See* 5 C.F.R. § 1320.4.

[446] *See id.* § 1320.4(b)(1).

[447] *See* DOD INSTR. 3020.37, *supra* note **71.**

[448] *See* PAGONIS, *supra* note 54, at 135 (discussing his rationale for creating a mirror logistical headquarters during Operation Desert Shield). "Given the possibility of a SCUD attack on my Dhahran nerve center, I was also interested in creating a redundant logistical headquarters outside Dhahran." *Id.*

[449] *See* 5 C.F.R. § 1320.4(b)(2).

Contractor cooperation is paramount. The information has "practical utility" in assisting proper contingency planning and contract administration.[450] The contractor will assume the burden of notifying the armed forces of changes in employee status. The contractor has a vested interest in ensuring that its employees are identified and deployed to the contingency area.

2. Regulatory Flexibility Act Issues — The purpose of the *DFARS* amendment is to inform contractors, not burden them. The goal of the regulatory amendment is to improve and "protect the health, safety and economic welfare of the Nation" and those who serve in the field.[451] The government bears the burden of performing both an initial and final "regulatory flexibility analysis."[452]

The proposed rules assist contractors by identifying potential site conditions, predeployment locations, and additional duties required of their employees. The information also serves to substantiate claims for veteran status submitted to the DOD C/MSRB. The potential for veterans benefits may be attractive to contractor employees, and a useful bargaining factor for government negotiations.

E. Implementation

The preceding discussion has outlined the considerations required for DAR Council approval.[453] First, the article identified the problem: lack of guidance to contractors concerning site conditions in the field.[454] Second, the article recommended *DFARS* notice provisions to resolve the problem.[455] Third, the article articulated the advantages and disadvantages of the *DFARS* provisions.[456] Fourth, the article considered collateral issues to address bureaucratic controls and public comment.[457] The final requirement is whether a deviation rather than a contract clause would achieve the same result: this is the focus of the following discussion.[458]

Deviation to the *DFARS* would offer temporary respite from the problems associated with deploying contractor employees in the field. The use of the Statement of Understanding requires public

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[450] *See id.* § 1320.4(b)(3).

[451] *See* Pub. L. No. 96-354, $2 (codified as amended at 5 U.S.C. §§ 601-6121 *reprinted in* 1980 U.S.C.C.A.N., 2788; *see also* **Exec.** Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

[452] *See* 5 U.S.C. §§ 603, 604.

[453] *See* DFARS, *supra* note 10, 201.201-1.

[454] *Id.* (d)(i)I.

[455] *Id.* (d)(i)II.

[456] *Id.* (d)(i)III.

[457] *Id.* (d)(i)IV.

[458] *Id.* (d)(i)V.

comment, therefore, the deviation must be published in the *Federal Register* for comment.[459] Because significant policy issues are at stake—arming of civilians, exposing civilians to hostile fire, assimilating civilians to the armed forces—deviation is inappropriate. The proposed *DFARS* amendments, as DOD policy, make potential site conditions common knowledge to all contractors and no longer the esoterica of international lawyers. Immediate implementation is warranted to meet future crises. The best course of action is to make notice provisions a permanent part of the *DFARS*.

VIII. Conclusion

United States citizen contractor employees serving with the Armed Forces of the United States in the field hold military status. They are legitimate objects of attack and become prisoners of war when captured. Despite the Armed Forces of the United States historical experience with contractors in the field, contractor employee status remains enigmatic.

The article has shown that modern contractor employees derive the benefits of historic armed forces practices conferring on them unquestionable military status. Contractor employees become prisoners of war; they are exempt from military obligations; they hold relative military rank; they are subject to military discipline; and they are considered, under some international agreements, to serve in an official capacity while deployed with the armed forces in the field. Sadly, the Armed Forces of the United States do not reflect these benchmark practices in government contract provisions, thereby keeping contractor status an enigma.

Unfortunately, United States logistics doctrine does not resolve the mystery. Contractor employees serve with the Armed Forces of the United States in the field worldwide. They deserve appropriate consideration from contracting officers, command planners, and command lawyers. They ought not be surprised about their status when they arrive in the field. The contract solicitation clause eliminates surprise.

Government contract communicates important facts about site conditions to contractors. The government is in a superior position to communicate facts about site conditions affecting personnel who serve in the field. As a result, contract notice provisions alert contractors to the realities of service in the field and deter the fair-weather and faint-hearted souls from the battlefield. Over the

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[459] *See id.* 201.402(3)(vii) (requiring publication of deviations under provisions of *FAR* part 1.5).

years, contractor employees have quietly but readily assimilated to support the armed forces in the field. The time has come to inform contractors about assimilation and make them a part of the total force.

The proposed amendments provide a contractual remedy to an unresolved doctrinal debate. The remedy is not a panacea, but potent preventive medicine that addresses basic misunderstandings about the status of contractor employees in the field. Complementing evolving Armed Forces of the United States doctrine, the proposed *DFARS* amendments will prepare United States civilian contractor employees for deployment in the field.

APPENDIX

PART 207.1—ACQUISITION PLANS

207.105 [Amended]

Section 207.105 is amended by adding the following:

207.105 Contents of written acquisition plans.

* * * * *

(b) Plan of Action. * * *

(18) Contingency and Overseas Deployments.

(A) Include notices to all contractors of the potential requirement to deploy employees in the field.

(B) Incorporate all contingency and deployment notices (see Subpart 237.XXX) to contractor employees as part of the basic contract.

(C) Accredit contractor employees for field service through a Statement of Understanding maintained in the contract file.

(D) Coordinate all contingency and deployment contract requirements with appropriate field commands and staffs.

(E) Integrate contractor employee data into Adjutant General, Force Development, Logistics, Mobilization, Operations (Planning and Training) cells at the supported unit. Designate Contract Officer Representatives (COR) to execute this planning imperative at the unit level.

PART 237 — SERVICE CONTRACTING

Add the following new sections:

237.XXX Contingency and Deployment Services.

237.XXX-1 Scope.

This section provides notice to contractors of the duties, obligations, and rights impacting their employees who deploy in the field, combat zone, hazardous duty area, or imminent danger zone.

237.XXX-2 Policy.

United States domestic law, and international law impose certain obligations on contractor personnel who serve with United States Armed Forces in the field. These obligations and rights create unique site conditions affecting contract performance. In certain circumstances, contractor employees may qualify for veteran status as a result of performance of contract under these site conditions.

237.XXX-3 Definitions.

(a) "Chain of Authority" identifies the contract employee's immediate communication channels to address life support and contract issues while deployed in the field. This is equivalent to a military chain of command.

(b) "In the field" means that contractor employees serve with or accompany United States Armed Forces overseas, or in certain parts of the United States and its territorial possessions during periods of combat or imminent danger.

(c) "Life Support Organization" refers to the entity that provides a deployed contractor employee basic administration, food, clothing, and subsistence in the field. The LSO includes entities such as the serviced unit, the Army Materiel Command's Logistics Support Element (LSE), or the Defense Logistics Agency's Contingency Support Team (DCST).

237.XXX-4 Procedures.

The contracting officer will notify the contractor of the duties and rights affecting employees deployed in support of United States Armed Forces in the field. The contracting officer will obtain signed acknowledgement forms from all potential deploying contractor employees and provide copies to the contract file, COR file, appropriate staff agencies, and field life support organization.

237.XXX-5 Contract clauses.

When contractor employees support United States Armed Forces in field, use the following clauses in solicitations and contracts:

(a) 252.237-7XXX, Statement of Understanding Concerning Service in the Field.

(b) 252.237-7XXX, Notice of Duty to Abide by the Code of Conduct for Members of the Armed Forces.

(c) 252.237-7XXX, Notice of Status Under International Law.

(d) 252.237-7XXX, Notice of the Department of Defense Civilian/Military Service Review Board (DOD C/MSRB).

(e) 252.237-7XXX, Notice of Attachment to a Life Support Organization in the Field.

(f) 252.237-7XXX, Notice of Obligations in the Field.

(g) 252.237-7XXX, Notice of Foreign Legal Jurisdiction Regime.

(h) 252.228-3, Workers' Compensation Insurance (Base Defense Act)(APR 84).

(i) 252.228-4, Workers' Compensation and War-Hazard Insurance Overseas (APR 84).

(j) 252.228-7000, Reimbursement for War-Hazard Loss (DEC 91).

(k) 252.228-7003, Capture and Detention (DEC 91).

(l) 252.802-70, Logistic Support and Privileges.

(m) 52.245-5, Government Property.

PART 252 — SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(a) 252.237-7XXX, Notice of Status under International Law.

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF STATUS UNDER INTERNATIONAL LAW (XXX-95)

(a) Contractor employees who serve with the Armed Forces of the United States in the field may be targeted by hostile forces as combatants. Contractor employees will normally serve with the Armed Forces of the United States in relatively secure areas. The Armed Forces of the United States cannot guarantee the safety of the personnel who serve in the field. Contractor employees who serve with the Armed Forces of the United States in the field could be exposed to combat and other dangerous site conditions. As a result, contractor employees are warned that they could lose life or limb.

(b) Contractor employees who are captured by enemy forces in international armed conflict become Prisoners of War. Contractor employees who serve exclusively as medical or chaplain personnel become Retained Persons if detained by enemy forces.

(c) For the purposes of Prisoner of War status, the Armed Forces of the United States will confer an assimilated rank upon contractor employees serving with the Armed Forces of the United States in the field. Assimilated rank relates only to privileges afforded by the Geneva Convention such as pay and work status and does not grant the employee authority over members of the Armed Forces of the United States.

(b) 252.237-7XXX, Notice of Duty to Abide by The Code of Conduct for Members of the Armed Forces.

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF DUTY TO ABIDE BY CODE OF CONDUCT FOR MEMBERS OF THE ARMED FORCES (XXX-95)

(a) United States Citizen Contractor employees who serve with the Armed Forces of the United States in the field risk capture by hostile forces.

(b) The Code of Conduct, as amended March 28, 1988, 53 F.R. 10355, provides a framework for Prisoners of War to survive the rigors of captivity. United States Citizen Contractor Employees who serve with the Armed Forces of the United States will familiarize themselves with the Code of Conduct for Members of the Armed Forces.

(c) 252.237-7XXX, Notice of Attachment to a Life Support Organization in the Field.

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF ATTACHMENT TO A LIFE SUPPORT ORGANIZATION IN THE FIELD (XXX-95)

(a) A designated Life Support Organization will provide contractor employees who serve with the Armed Forces of the United States in the field with administration, logistics, and other life support.

(b) Contractor employees deployed under terms of this contract will be administered by _____ _____[i.e.: AMC, LSE; DCST] [If this informa-

tion is not available, state "To Be Determined"] Point of contact for predeployment preparation is _____

(d) 252.237-7XXX, Notice of Contractor Employee Obligations in the Field.

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF CONTRACTOR EMPLOYEE OBLIGATIONS IN THE FIELD (XXX-95)

(a) Contractor employees serving with the Armed Forces of the United States shall abide by the orders and regulations issued by the field commander, as published by the servicing Life Support Organization.

(b) Contractor employees shall attend predeployment training as required by contract, at a place to be designated.

(c) In time of war, declared by Congress, contractor employees are subject to the Uniform Code of Military Justice.

(e) 252.237-7XXX, Notice of Foreign Legal Jurisdiction Regime.

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF FOREIGN LEGAL JURISDICTION REGIME (XXX-95)

(a) Civilian contractor employees may be subject to foreign civil and criminal jurisdiction when deployed overseas. When the Armed Forces of the United States deploy to a foreign country all diplomatic efforts are made to secure the most favorable legal status of its personnel. In some situations civilians, who accompany or serve with the Armed Forces of the United States in the field, may be subject to the laws of the foreign country.

(b) Pursuant to Title 10 U.S.C. Section 1037, as amended, the Armed Forces of the United States may provide counsel, interpreter, and prison visitation services, upon written request of the employee. The Armed Forces of the United States will grant requests for payment of fees and costs, associated with the defense of either criminal or civil matters, from contractor employees only in exceptional cases. Contractors should ensure that they have arranged for legal services for their employees deploying in the field.

(f) 252.237-7XXX, Notice of Department of Defense Civilian/Military Service Review Board (DOD C/MSRB).

As prescribed in 217.XXX-X, use the following clause:

NOTICE OF THE DEPARTMENT OF DEFENSE CIVILIAN/ MILITARY SERVICE REVIEW BOARD (DOD C/MSRB) (XXX-95)

(a) Certain groups of contractor employees may qualify for benefits administered by the Department of Veteran Affairs, on the basis of their service with the Armed Forces of the United States in the field. The Department of Defense Civilian/Military Service Review Board determines whether civilians who served with the Armed Forces of the United States qualify under criteria that includes the following: service during a qualifying armed conflict; integration to the Armed Forces; subjection to military discipline; subjection to courts-martial jurisdiction; receipt of military training; and status under international law.

(b) Contractor employees are advised to submit completed applications, under provisions 32 C.F.R. Part 47, as follows:

Secretary of the Air Force (SAF/MRC)

DOD Civilian/Military Service Review Board

Washington, D.C. 20330-1000

(g) 252.237-7XXX, Statement of Understanding Concerning Service in the Field.

As prescribed in 217.XXX-X, use the following clause:

STATEMENT OF UNDERSTANDING CONCERNING SERVICE IN THE FIELD (XXX-95)

(a)The Government may require performance of services on worldwide contingencies. The contractor must identify employees who will perform services under this contract while serving with or accompanying the Armed Forces of the United States in the field.

(b) All contractor employees must sign the following Statement of Understanding as a condition precedent to serving with the Armed Forces of the United States in the field:

STATEMENT OF UNDERSTANDING CONCERNING SERVICE IN THE FIELD

In connection with authority granted by terms of a contract awarded by the Department of Defense or its subordinate branches, I, _____acknowledge that I will

deploy to serve with the Armed Forces of the United States in the field, in the following capacity:

_____

_____

[contracted advisory assistance service expert/contract field representative/technical advisor/technical expert etcl.

I understand the following conditions may prevail in the field:

1. That I understand that I must obey and respect all Government rules, regulations, and instructions that apply to civilians serving with or accompanying the force in the field.

2. That I will keep my Chain of Authority fully informed of all matters concerning my obligations under contract. I will inform the servicing life support organization in the field of my location at all times.

3. That I will govern my movements and actions in accordance with the instructions of the Department of Defense and subordinate organizations, and the field commander. I understand that I must abide by all administrative rules and orders issued by the field commander. If I violate Armed Forces rules, I may suffer administrative sanctions, including revocation of the Armed Forces of the United States privileges, including government furnished vehicles, transportation, morale & recreation services. Under terms of Government acquisition regulation, I may be required to depart a foreign country at my own expense, and my employer may be denied certain claims for reimbursement under its contract with the Government..

4. I understand that in time of war, as declared by Congress, I will be subject to the Uniform Code of Military Justice.

5. I understand that in the absence of a governing treaty, diplomatic arrangement, or status of forces agreement, I may be subject to the exclusive civil and criminal jurisdiction of the country to which I am deployed. In order to derive benefits under the Armed Forces foreign legal jurisdiction regime, I understand that I must inform my servicing life support organization if I am arrested, apprehended, detained, examined, subpoenaed or otherwise subject to the civil or criminal jurisdiction of the host nation. I understand that in unusual circumstances the Department of Defense may pay for my counsel, and other related services under provisions of Title 10 United States Code Section 1037, as amended, upon my written request.

6. I understand that the term "in the field" may include combat zones, imminent danger areas, and other places of potential hostilities. Therefore, I understand that I could lose life or limb.

7. I understand that under international law, I am considered a military target. I understand that under domestic United States practice, I may be considered assimilated to the Armed Forces of the United States. I understand that I will become a Prisoner of War if I am captured by opposing forces. I understand that I may be required to wear a Government-issued uniform. I understand that the Government may also issue me protective clothing, equipment, and in some circumstances, weapons. I understand that I will be held accountable for Government-furnished property under the Report of Survey system.

8. I understand that I should abide by the Code of Conduct for Members of the Armed Forces, to fulfil my rights and obligations as a Prisoner of War.

9. That upon termination or revocation of my status as a civilian serving with the Armed Forces of the United States, I understand that I must surrender to the Armed Forces all Government-issued identification, credentials, security passes, weapons, and other Government-furnished property.

Dated: _____

Representing: _____

Address: _____

Witnessed: _____

Unit: _____

RESTORING THE PROMISE OF THE RIGHT TO SPEEDY TRIAL TO SERVICE MEMBERS IN PRETRIAL ARREST AND CONFINEMENT

MAJOR DANIEL P. SHAVER*

I. Introduction

The Sixth Amendment to the United States Constitution guarantees that an "accused shall enjoy the right to a speedy. . . trial."[1] Additionally, the Eighth Amendment, by proscribing excessive bail, implicitly reinforces the principle that an individual is presumed innocent and should retain the right to liberty until the state actually convicts that individual of a crime.2 The Constitution, however, does not explicitly distinguish the right to a speedy trial enjoyed by a person who is free during pretrial proceedings from the same right enjoyed by a person whom the government has restrained or confined prior to a finding of guilt. Nevertheless, because any form of detention inherently deprives the individual of some measure of liberty, the right to a speedy trial is plainly more important to an individual under restraint—particularly pretrial confinement—than it is to someone enjoying relatively free reign while awaiting trial. Accordingly, the right to a speedy trial not only serves as an element of repose that protects individuals from the dilatory effects of indeterminate criminal proceedings, but also prevents the state from capriciously depriving a person—a person whom the law cloaks with a presumption of innocence—of his or her fundamental right to liberty.

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[1]U.S. CONST. amend. VI.

[2]*Id.* amend. 8 ("Excessivebail shall not be required . . . .").

The federal government correctly has taken the speedy trial mandate seriously by legislating speedy trial laws, executing speedy trial rules, and adjudicating speedy trial issues. The resulting body of law charges the government, in all criminal prosecutions, with the duty to exercise reasonable diligence in moving the case to trial. Similarly, protecting an accused service member's right to a swift resolution of pending criminal charges has typified the development of speedy trial law in the military, creating a speedy trial framework that other justice systems in America consistently have acknowledged, if not emulated.[3]

Not surprisingly, all three branches of the federal government have made their marks on the emergence of the present state of speedy trial law in the military. In passing the Uniform Code of Military Justice (Code or UCMJ) in 1950,[4] Congress included Article 10, which requires the government to take "immediate steps" to try an accused whom a commander has placed in pretrial arrest or confinement.[5] Seeing the need to clarify this congressional mandate, the United States Court of Military Appeals in *United States v. Burton*[6] declared that the government presumptively has failed to take the "immediate steps" required by UCMJ Article 10 if it has held an accused in pretrial confinement for more than three months.[7] Almost coincidentally, the United States Supreme Court established a four-part balancing test for evaluating Sixth Amendment speedy trial claims in *Barker v. Wingo*.[8]

Twenty years later, the President promulgated a new Rule for Courts-Martial (R.C.M.) 707,[9] which generally directs military

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[3] *Cf.* W. WINTHROP, MILITARY LAW AND PRECEDENTS, preface (1st ed. 1886) (noting that military law typically sets the example for other justice systems to follow).

4 U.C.M.J. art. 10 (1988).

[5] *See id.* ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

[6] 44 C.M.R. 166 (C.M.A. 1971), *overruled in part by* United States v. McCallister, 27 M.J. 138 (C.M.A. 1988) (prospectively repealing the holding in *Burton* in so much as it provided an accused to a speedy trial right that he or she could trigger by a demand). On October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States court of Military Appeals to the United States Court of Appeals for the Armed Forces. The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. ***See*** United States v. Loving, 41 M.J. 213, 229 n.* (1995). This note will refer to the court by the name applicable when the court rendered its decision.

[7] *See* United States v. Driver, 49 C.M.R. 376, 379 (C.M.A. 1974) (changing the *Burton* three-month speedy trial rule to a more workable 90-day rule).

[8] 407 U.S. 524, 530 (1972).

[9] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (1984) [hereinafter MCM].

authorities to bring an accused to trial within 120 days. This new rule, which appears in Change 5 to the *Manual for Courts-Martial*[10] *(Manual)*, envisaged the simplification of some forty years of confusion over what the right to a speedy trial means to a person subject to the Code. The enactment of this new rule apparently was sufficient to convince the Court of Military Appeals that the President finally had provided a procedural mechanism that was capable of carrying out Article 10's "immediate steps" mandate without judicial intervention. Accordingly, in *United States v. Kossman*,[11] the Court of Military Appeals retired the *Burton* ninety-day rule. A critical analysis of the court's holding in *Kossman*, however, reveals that it resurrects a multitude of issues—and creates a number of new issues—that will affect a service member's right to a speedy trial. The most important consequence of the *Kossman* decision and the provisions of the new R.C.M. 707, however, is that they render the present structure for assuring the right to a speedy trial to service members in pretrial detention statutorily infirm and constitutionally unavailing.

11. Constitutional Rights to a Speedy Trial

The Due Process Clause of the Fifth Amendment and Speedy Trial Clause of the Sixth Amendment are the primary sources of every citizen's right to a speedy trial. Additionally, Congress and most state legislatures have passed speedy trial statutes that provide criminal defendants with even greater speedy trial rights than those secured by the Bill of Rights.[12]

A. *Speedy Trial and Due Process*

In general, the Due Process Clause of the Fifth Amendment protects an individual from the prejudicial effects of deliberate government delays in accusing, charging, and indicting on criminal offenses. In *United States v. Marion*,[13] the Supreme Court held that

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[10] *See id.* R.C. M. 707(a) (1984) (C5, 15 Nov. 1991).

[11] 38 M.J. 258 (C.M.A. 1993).

[12] *See, e.g.*, The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988); CAL. PENAL CODE § 1382 (West 1970); ILL. REV. STAT. ch. 38, para. 103-5(a) (1969); NEV. REV. STAT. § 178.556 (1967); PA. STAT. Ass. tit. 19, § 781 (1964); VA. CODE ANN. § 19.1-191 (Michie 1960). Speedy trial statutes, which generally attempt to enforce all of the personal freedoms and societal interests that inhere from the right to a speedy trial, reify the idea that, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1986).

[13] 404 U.S. 307 (1971).

the familiar Sixth Amendment right to a speedy trial did not apply until the government actually had "arrested, charged, or otherwise subjected [an individual] to formal restraint prior to indictment."[14] The Court noted that statutes of limitations generally protect the individual from any prejudice that may inhere from an extended delay prior to the pendency of formal criminal proceedings.[15] Nevertheless, the *Marion* Court conceded that excessive and unnecessary delays prior to an individual's arrest or indictment could trigger due process concerns. Justice Douglas's concurring opinion aptly states the following:

> The anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law.[16]

In *United States u. Lovasco*,[17] the Court addressed the issue of whether the actual prejudice arising from a delay in charging an individual could be sufficiently detrimental to warrant the remedy of dismissal. Noting that the Sixth Amendment did not apply to such a claim,[18] the *Louasco* Court formulated a two-part test to determine whether precharging delays violated a putative defen-

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[14] *Id.* at 325; *see also id.* at 319 (citing Note, *The Right to a Speedy Trial,* 57 COL. L. REV. 846, 848 (1957))("[i]n no event . . . [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this").

[15] *Marion,* 404 U.S. at 325-26. The Court specifically noted that the prejudices commonly cited by defendants to support Sixth Amendment speedy trial claims—namely, the possibility that memories will dim, evidence will be lost, and witnesses may become unavailable—normally will be insufficient to support a due process speedy trial claim. *Id.* As long as an appropriate statute of limitations covers the actionable criminal conduct, the individual enjoys a right to repose that is adequate to protect him or her from indeterminate criminal proceedings. *See* United States v. Habig, 390 U.S. 222, 227 (1968) (criminal statutes of limitations are statutes of repose); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944) ("even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and . . . the right to be free from stale claims in time comes to prevail over the right to prosecute them"). In addition, the Court reasserted its holding in Toussie v. United States, 397 U.S. 112 (1970), by noting that statutes of limitations "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.* at 114-15.

[16] *Marion,* 404 U.S. at 330-31 (Douglas, J., concurring).

[17] 431 U S. 783 (1977).

[18] *Id.* at 790; *see Marion,* 404 U.S. at 321.

dant's due process rights.[19] The defendant first must prove that he or she suffered actual prejudice because of the delay.[20] Second, the court must find that the government deliberately and oppressively delayed its prosecution of the case or intentionally acted in a dilatory manner with indifference to the rights of the prospective defendant.[21] If a defendant meets this two-part test, the court must dismiss the applicable charge with prejudice.

Because of the harshness of the dismissal sanction, the Supreme Court apparently recognized that a due process speedy trial right is important. Nevertheless, the *Lovasco* Court presumably still was convinced that statutes of limitations are the principle safeguards against prejudice to would-be defendants; it concluded its opinion by acknowledging that few defendants would be able to demonstrate a quantum of actual prejudice sufficient to force a trial court to inquire into the actions of the government.[22]

Because due process speedy trial issues do not arise as often as Sixth Amendment speedy trial claims, *Marion* and *Lovasco* are not as important as adjuncts to the body of speedy trial law as they are espousers of the values that support the right to a speedy trial. Specifically, in both of these cases, the Supreme Court implicated liberty as the basic value that the right to a speedy trial protects. In *Marion,* for instance, the Court noted that, even in the absence of

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[19] *Lovasco,* 431 U.S. at 790.

[20] *Id.* The Court implied that this first prong may not necessarily be crucial, stating that "proof of prejudice is ***generally*** a necessary . . . element." ***Id.*** (emphasis added). This language may give a court the necessary discretion to hold—even in the absence of proof of actual prejudice—that a due process violation has occurred when the government's actions are especially oppressive. Many of the federal courts of appeals have adopted a burden-shifting presumption that, upon a finding that the government has acted dilatory, requires the prosecution to demonstrate that the defendant was not prejudiced by the delay. ***See*** Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1971); United States ***ex rel.*** Solomon v. Mancusi, 412 F.2d 88, 91 (2d Cir. 1969); Pitts v. North Carolina, 395 F.2d 182, 184 (4th Cir. 1968); ***see also*** Bethea v. United States, 395 A.2d 787, 789 (D.C. Ct. App. 1978) (requiring government to show that defendant suffered only minimal anxiety because of lengthy delay).

[21] *Lovasco*, 431 U.S. at 790. The *Louasco* Court did not give specific examples of government oppression. Accordingly, the second prong of the test apparently requires the trial court to determine whether the government acted in bad faith. ***See id.*** at 796-97; ***see also id.*** at 792-95 (government may have a variety of good-faith reasons for a delay in charging or arresting an individual; therefore, the government never is required to charge or arrest a person at the first opportunity).

[22] *Id.* at 796. While the *Louasco* Court was concerned about making the first prong of the two-part due process test too easy for a defendant to meet, it evidently was more concerned about the inevitable repercussions on prosecutorial actions if courts were to reach the second prong too often. Specifically, if courts regularly required the prosecution to justify its precharging delays, the government may act with unnecessary haste in arresting or charging suspects. ***See*** *also* ***Marion,*** 404 U.S. at 325 n.18 (citing Hoffa v. United States, 385 U.S. 293, 310 (1966)) (acknowledging that law enforcement officials risk violating the Fourth Amendment if they "act too soon").

actual prejudice to the defense case, an inordinate pretrial delay may "seriously interfere with the defendant's liberty."[23] In addition, when the Court had the opportunity to fashion an analogous rule that would have protected property interests in the same manner that *Louasco* protects liberty interests, the justices declined to do so.[24] Accordingly, the liberty of the individual—whether that individual actually suffers physical detention or merely agonizes over the specter of criminal proceedings—is the essential value that the due process right to speedy trial seeks to vindicate. This liberty interest is no less important to service members than it is to civilians.[25]

B. The Sixth Amendment Right to Speedy *Trial*

The right to a speedy trial is "as fundamental as any rights secured by the Sixth Amendment."[26] In Smith *v. Hooey*,[27] the Supreme Court addressed the three principal interests that the Sixth Amendment right to speedy trial protects: "(1) to prevent undue and oppressive incarceration prior to trial; **(2)** to minimize anxiety and concern accompanying public accusation; and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself."[28] **A** speedy trial also provides society

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[23]United States v. Marion, 404 U.S. 307, 320 (1971) (noting that trial delays affect a defendant's liberty interests and "may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends"); **see** *also* United States v. Palmer, 502 F.2d 1233, 1234 (5th Cir. 1974) (defendant alleging that he was living under the "sword of Damocles" while he awaited the government's decision to prosecute).

[24]*See* United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555,557 (1983). In *Eight Thousand Eight Hundred and Fifty Dollars,* the defendants urged the Court to adopt the *Louasco* due process speedy trial rule to vindicate their property rights. The defendants alleged that inordinate postseizure delays in a forfeiture proceeding were prejudicial to their property rights in confiscated money, thereby raising a *Lovasco* issue. The Court, however, declined to employ the *Lovasco* test. *Id.* One explanation for the Court's unwillingness to extend the *Lovasco* rationale to protect property rights in the speedy trial context is that loss of the use of one's property is ultimately compensable, but loss of "the use" of one's liberty is not.

[25]*See* United States v. Devine, 36 M.J. 673, 677 (N.M.C.M.R. 1992). In *Deuine,* the Navy-Marine Corps Court of Military Review recognized that due process requires the dismissal of charges if an oppressive prepreferral delay prejudices an accused's case. *Id.* Such delays, the court noted, "violate[] those fundamental conceptions of justice which lie at the base of civil and political institutions and which define the community's sense of fair play and decency." *Id.* (citing *Louasco,* 431 U.S. at 790).

[26]Klopfer v. North Carolina, 386 U.S. 213, 223 (1967). In *Klopfer,* the Supreme Court held that the Sixth Amendment right to a speedy trial applied to the states through the Due Process Clause of the Fourteenth Amendment. *Id.*

[27]393 U.S. 374 (1969).

[28]*Id.* at 377-78.

with ancillary benefits.[29] Nevertheless, even though the Supreme Court has distinguished the right to a speedy trial because it is a right in which the accused and society share interests, the government has no vicarious "right" to a speedy trial to protect those societal interests.30

The seminal case in Sixth Amendment speedy trial law is ***Barker** v. Wingo*.[31] The government indicted Barker in September 1958 for the July 1958 killing of an elderly couple. After sixteen continuance@—caused largely by the government's resolve to convict Barker's coconspirator in the killings prior to trying Barker—the prosecution finally proceeded with its case in October 1963. The Supreme Court confirmed Barker's conviction, but decided to use this case to delineate a four-factor test to determine whether the government had violated a defendant's Sixth Amendment right to a speedy trial. These factors are: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant demanded—or waived—his or her right to speedy trial; and **(4)** whether the defendant suffered any actual prejudice because of the delay.[33]

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[29]*See* Dickey v. Florida, 398 U.S. 30 (1970); Ponzi v. Fessenden, 258 U.S. 254 (1922). In *Dickey*, Justice Brennan observed that swift justice enhances the criminal law's deterrent effect on individuals, and that a torpid justice system tends to increase the likelihood that defendants will become fugitives or will commit other acts of misconduct. *Dickey*, 398 US. at 42 (Brennan, J., concurring). In *Ponzi*, the Court pointed out that delays can have the same deleterious effect on the prosecution's ability to prove its case as they have on the individual's ability to defend himself or herself. ***See** Ponzi*, 258 U.S. at 264.

[30]*Cf.* Barker v. Wingo, 407 US. 514, 521 (1972); United States **v.** Ewell, 383 US. 116, 120 (1966). In *Barker*, the Supreme Court recognized the manifold societal interests that speedy trials promote. It noted that delays contribute to the backlog of cases; allow criminals to "cut" better pretrial deals with prosecutors; increase the likelihood of individuals to jump bail, escape, or commit other crimes; diminish the effectiveness of rehabilitative efforts; contribute to prison overcrowding, which leads to increased costs, deplorable conditions, and even violent rioting; and increase the costs to society and families through lost wages. *Barker*, 407 U.S. at 521. While these societal interests are obviously substantial, at least one commentator has confirmed a point that should be just as obvious—that is, societal interests play no part in the Sixth Amendment right to a speedy trial. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 685 (1985) (criticizing *Barker's* judicial recognition of a societal interest by noting, "[T]he Bill of Rights does not speak of the rights and interests of the government. Moreover, to assert that this "societal interest" might well be disserved if the defendant was to surrender his right . . . [does not] make the speedy trial right different from the other Sixth Amendment rights").

[31]407 U.S. **514** (1972).

[32]*Id.* at **517** (noting that Barker actually raised his first speedy trial objection after the government moved for its twelfth continuance in February 1962).

[33]*Id.* at 530. Actually, the *Barker* Court merely adopted a Sixth Amendment speedy trial test that several federal circuits had been employing for almost a decade. ***See** generally* United States **v.** Banks, 370 F.2d 141 (4th Cir. 1966), *cert. denied*, 386 U.S. 997 (1967); Bautte v. United States, **350** F.2d 389 (9th Cir. 19651, *cert. denied*, 385 U.S. 856 (1966); United States v. Simmons, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).

Although it acknowledged that the first factor—the length of the delay—normally would trigger the analysis,[34] the ***Barker*** Court stressed that none of the four factors was dispositive.

> We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. . . . In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.[35]

The Court reiterated the broad parameters of this balancing test in ***Moore v. Arizona.***[36] In particular, ***Moore*** overturned an Arizona Supreme Court decision that interpreted ***Barker*** to mean that prejudice to the defendant was a condition precedent to finding a Sixth Amendment speedy trial violation.[37] The high Court noted that ***Barker*** "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to speedy trial."[38]

The Supreme Court's decision in Barker, and its clarification of that decision in Moore, intimate that courts must consider all four Barker factors, but need to rely on no more than one in finding a Sixth Amendment speedy trial violation. Barker, therefore, is just as important for what it does not require to sustain a defendant's objection, as it is for what it does require. Most significantly, however, Barker and Moore hold that courts cannot summarily deny a defendant's otherwise valid Sixth Amendment speedy trial objection because he or she fails to show either a substantial length of delay or actual prejudice.

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[34] *Barker*, 407 U.S. at 530. Recently, the Supreme Court hinted that a delay of one year may raise a presumption that the government has prejudiced the defendant, thereby requiring the courts to review the reasons for delay. ***See*** Doggett v. United States, 112 S. Ct. 2686, 2691 n.1 (1992). The ***Doggett*** Court, however, stopped short of adopting an automatic presumption of prejudice. Accordingly, the Supreme Court continues to require lower courts to consider all of the broad parameters of the ***Barker*** balancing test. *Cf.* United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), ***overruled*** *by* United States v. Kossman, 38 M.J. **258** (C.M.A. 1993) (sanctioning a rule by which a three-month trial delay would trigger a presumption of a statutory speedy trial violation in the military).

[35] *Barker*, 407 U.S. at 533 (footnote omitted).

[36] 414 U.S. 24 (1973).

[37] *Id.* at 26 ("The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim.").

[38] *Id.*

C. Reconciling the Fifth and Sixth Amendment Rights to Speedy Dial

When speedy trial issues arise prior to arrest or indictment, the Fifth Amendment Due Process Clause sufficiently vindicates most of the traditional liberty interests—that is, liberty interests such as the rights to one's reputation, to be free from unnecessary anxiety, and to conduct one's affairs without unwarranted interference.[39] The Sixth Amendment Speedy Trial Clause, on the other hand, prescribes an independent right to a speedy trial. *Smith* v. *Hooey* held that this right is founded on three interests: preventing capricious pretrial incarceration; minimizing the defendant's anxiety; and limiting the prejudicial effects of delay on the defense.[40] The *Louasco* test, however, which relies entirely on the Fifth Amendment right to due process of law, already protects the undetained, prospective defendant from the prejudicial effects that oppressive government delays have on that person's nonphysical liberty interests.[41] Consequently, while the Sixth Amendment right to a speedy trial serves many laudatory purposes—and has many ancillary societal benefits—it actually adds only two principal protections to the guarantees that the Due Process Clause already affords. First, it protects the individual from the marginal quantum of anxiety that he or she may experience after the transition from a mere suspect to an accused defendant. Second, it protects the physical liberty interests of all untried detainees, regardless of whether or not the government formally has charged them. The Supreme Court virtually clarified this distillation of Sixth Amendment speedy trial law in *Marion* by holding that only a formal accusation against, or a detention of, an individual will trigger the speedy trial protections of the Sixth Amendment.

Nevertheless, the vitality of the Due Process Clause may narrow the need for the Sixth Amendment speedy trial right even further. The Supreme Court noted in *Smith v. Hooey* that the right to a speedy trial is meant to minimize a defendant's "anxiety and con-

[39] *Cf.* Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 US. 390 (1923)) (due process protection of liberty proscribes not only physical restraint, but also all threats to the right "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men"). In Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court held that mere injury to reputation did not constitute a per se deprivation of liberty. *Id.* at 708-10. The Court, however, was careful to point out that, in *Paul*, the petitioner could vindicate his liberty interest—that is, his reputation—by filing a tort action for defamation. Without a recourse in tort, the *Paul* Court likely would have found an irreconcilable liberty deprivation. Justice Steven's dissenting opinion in Ingraham v. Wright, 430 U.S. 651, 700 (1977), essentially confirms that this was the Court's rationale for declining to find a protected liberty interest in *Paul*.

[40] Smith v. Hooey, 393 U.S. 374, 377-79 (1969).

[41] *See supra* notes 17-22 and accompanying text.

cern."[42] Arguably, however, this interest is limited, not only because this additional anxiety frequently is minimal, but also because a putative defendant's anxiety often will diminish once he or she is formally charged.[43] In addition, when it referred to the Sixth Amendment's guarantee of a speedy trial in *Barker v. Wingo*, the Court noted that the right "is specifically *affirmed* in the Constitution."[44] This language implies that the justices recognized that the right to a speedy trial derives from legal customs and traditions of fairness that antedate the Bill of Rights. Therefore, notwithstanding their manifest importance to the overall rights of an accused, the supplementary protections afforded by the Sixth Amendment right to a speedy trial are very limited.

The narrow reach of the Sixth Amendment speedy trial right becomes even more clear by considering the tremendously expanded coverage in the area of procedural due process. Even before *Mathews v. Eldridge*,[45] petitioners had invoked the Due Process Clause to protect personal interests in welfare payments,[46] driver's licenses,[47] and school attendance.48 That due process would not also protect a presumptively innocent person from the unwarranted liberty deprivations "attendant on public accusation"[49] is inconceiv-

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[42]*See* Smith, 393 U.S. at 377. The Supreme Court stated that one of the basic tenents of the right to a speedy trial is "to minimize anxiety and concern accompanying *public* accusation." *Id.* (emphasis added).

[43]*See* United States v. Marion, 404 U.S. 455, 331-32 (1971) (Douglas, J., concurring) ("The anxiety and concern attendant to public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested."); ***see*** also CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 25.02, at 608 (1993) ("A person under public investigation can suffer as much damage to reputation and financial and occupational interests as an arrested person.").

"Barker v. Wingo, 407 U.S. 514,533 (1972) (emphasis added).

[45]424 U.S. 319 (1976). In Mathews, the Supreme Court created a balancing test to determine the extent of due process procedural protections that the government must afford an individual before it takes an action that could deprive that individual of a constitutionally protected liberty or property interest. The Court stated that it would consider three factors: (1) the importance of the interest; (2) the efficacy of the proposed procedure in reducing the risk of an erroneous deprivation; and (3) the government's interests in minimizing the burdens and costs involved in providing enhanced safeguards. *Id.* at 335.

[46]*See* generally Goldberg v. Kelly, 397 U.S. 254 (1970) (extensive pretermination hearing is a condition precedent to government's terminating subsistence payments to an indigent).

[47]*See* generally Bell v. Burson, 402 U.S. 535 (1971) (law that requires law enforcement officials to suspend the driver's license of a individual involved in an accident unless that individual could provide security to cover potential tort judgments violates due process unless the state affords the individual a presuspension hearing).

[48]*See* generally Goss v. Lopez, 419 U.S. **565** (1975) (sanction of suspension infringed on students' liberty interests because it could affect their opportunities for employment and association).

[49]United States v. Marion, 404 US. 307, 331 (1971) (Douglas, J., concurring).

able. Moreover, consider the absurdity of a case in which an undetained criminal defendant could satisfy the *Barker* Sixth Amendment speedy trial test, but could not prevail on a *Lovasco* due process speedy trial claim. The most important point, however, is that in the absence of the Sixth Amendment, most of the interests that the independent right to a speedy trial guarantees still would receive protection under the Due Process Clause.

Even though courts, commentators, and historians have posited the numerous interests served by the right to a speedy trial, they often have failed to distinguish between the two sources of speedy trial rights in the Constitution. While the language of the Sixth Amendment contains the express right with which most lawyers are familiar, the Fifth Amendment Due Process Clause provides substantial speedy trial protections as well. Accordingly, few practitioners probably recognize how narrow the Sixth Amendment right really is. Nevertheless, above and beyond the protections that inhere from the Fifth Amendment Due Process Clause, the Sixth Amendment right to a speedy trial has one paramount purpose: restoring the physical liberty rights of innocent persons as soon as reasonably possible.

111. Federal Statutory Speedy Trial Rights

Although *Barker v. Wingo*[50] established a broad test for determining if a Sixth Amendment speedy trial violation had occurred, the Supreme Court has confirmed that the prerogative to specify explicit temporal criteria that would trigger a defendant's speedy trial rights vests with the legislature.51 Accordingly, two years after the Court rendered its opinion in *Barker,* Congress passed the Federal Speedy Trial Act of 1974 (FSTA).[52] In general, the FSTA requires the prosecution to bring a defendant to trial within 100 days of the date of his or her arrest or service of summons, or within ninety days of the onset of pretrial detention, whichever is earlier.[53] Not surprisingly, the FSTA allows for several exemptions from the

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[50]407 U.S. 514 (1972).

[51]*Cf.* Doggett v. United States, 112 S. Ct. 2686, 2691 (1992) (courts may find presumption of prejudice as pretrial delay approaches one year).

[52]18 U.S.C.§§ 3161-3174 (1988).

[53]*Id.* §§ 3161(b), 3164(b). The FSTA actually specifies three separate and explicit time limits as follows: (1) the government must file an information or indictment within 30 days of arrest or service of summons; (2) the prosecution must commence its trial of the defendant within 70 days of information or indictment, or within 70 days of the defendant's first appearance before a judicial officer, whichever is later; and (3) unless the defendant expressly waives his or her right to counsel, no

running of these time limits,[54] and specifically excludes periods of delay caused by continuances that the trial court grants to "serve the ends of justice."[55] The remedy for an FSTA violation is dismissal, although the trial court has discretion to dismiss with or without prejudice.[56]

Although the 100-day time limit delineates the temporal boundaries for all criminal prosecutions, one key element of the FSTA provides added protections to defendants in pretrial detention. As section 3164 of the FSTA mandates, "[tlhe trial or other disposition of cases involving . . . a detained person who is being held in detention solely because he is awaiting trial . . . *shall be accorded priority.*"[57] This critical provision offers some insight into Congress's rationale for passing the FSTA. More than any other reason, Congress was concerned that the failure to accord a speedy

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trial may commence within 30 days of the defendant's first appearance with counsel. ***Id.*** § 3161(b), (c)(1)-(2). At least two circuits have held that, for FSTA purposes, trial is deemed to begin when the prosecution initiates voir dire. ***See generally*** United States v. Richmond, 735 F.2d 208 (6th Cir. 1984); United Stated v. Manfredi, 722 F.2d 519 (9th Cir. 1983).

[54] *See* 18 U.S.C. § 3161(h)(1)-(8) (1988). The exemptions that toll the running of the FSTA's 100-day clock include the following: (1) deferral agreements among the prosecution, the defense, and the court; (2) delays attributable to the unavailability of the defendant or essential witnesses; (3) delays attributable to the defendant's inability to stand trial; (4) certain delays that resulted from the defendant's drug rehabilitation treatment; and (5) reasonable delays resulting from the government's joinder of defendants. *Id.* Additionally, most delays caused by pretrial motions and similar proceedings are excluded. ***See also*** Henderson v. United States, 476 U.S. 321, 326-30 (1986) (holding that courts could exclude delays attributable to pretrial motions even absent an express finding that such delays were "reasonably necessary"). Courts also may exclude time periods between the dates the prosecution drops a charge and files a new charge on the same or related offense. 18 U.S.C. § 3161(h)(6) (1988); *cf.* United States v. Loud Hawk, 474 U.S. 302 (1986) (time period between dismissal of charges at trial and reinstatement due to appellate decision in the prosecution's favor is excludable for speedy trial purposes); United States v. McDonald, 456 U.S. 1 (1982) (four-year hiatus between dismissal of charges and reindictment of essentially similar charges did not implicate speedy trial rights).

[55] 18 U.S.C. § 3161(h)(8) (1988). Federal circuits have found continuances to "serve the ends of justice" in several cases. ***See, e.g.***, United States v. Nance, 666 F.2d 353, 355-56 (9th Cir.), ***cert. denied,*** 456 U.S. 918 (1982) (continuances to assure that defendant had adequate opportunity to secure counsel served the ends of justice); United States v. Martin, 742 F.2d 512, 514 (9th Cir. 1984) (continuance granted to see if United States Supreme Court would overturn circuit precedent unfavorable to the defendant was valid). *But* ***see*** United States v. Perez-Reveles, 715 F.2d 1348, 1350 (9th Cir. 1984) (complexity of case is not necessarily a valid reason to grant a continuance to give government additional time to prepare).

[56] *See* 18 U.S.C. § 3162 (1988). In determining whether to dismiss with or without prejudice, the court must consider the seriousness of the offense, the reasons for the FSTA violation, and the interests of justice. ***Id.*** In addition, even though the FSTA does not list prejudice to the defendant as a factor, the Supreme Court has determined that Congress actually intended courts to contemplate prejudice in their dismissal decisions. ***See*** United States v. Taylor, 487 U.S. 326, 341 (1988).

[57] 18 U.S.C. § 3164 (1988) (emphasis added).

trial would cause irreparable harm to the innocent person.[58] The legislative history of the FSTA recites all of the deleterious effects caused by delays in processing criminal charges that the Supreme Court had pointed out in United States *v. Marion,*[59] including the cloud of anxiety, suspicion, and hostility under which the putative defendant must carry on his or her life.[60] The FSTA, therefore, provides some degree of speedy trial protection to all criminal defendants,[61] but deliberately provides enhanced speedy trial protections to defendants in pretrial detention.

In addition, the House Report that explains the statute clearly concentrates on Congress's concern over the effects that lengthy delays have on pretrial detainees. The history of the FSTA notes that pretrial incarceration disrupts family life and interferes with associations; enforces idleness; provides few recreational opportunities; affords no rehabilitation; and hinders the preparation of a defense by diminishing the defendant's ability to gather evidence, contact witnesses, and consult with counsel.[62] Pretrial incarceration also causes a loss of privacy, imposes a relatively harsh disciplinary routine, and gives the government a tactical advantage in securing evidence and communicating with witnesses.[63] Finally, the House Report acknowledges the benefits that speedy trials accrue to the public; however, the societal advantages it enumerates — reduced prison costs and the defendant's continued productivity as a member of society — apparently address the harms of pretrial detention, not the harms of pretrial delays in general. Accordingly, when Congress passed the FSTA, its principal concern was to minimize the pernicious effect that lengthy pretrial detention has on presumptively innocent persons.

In the wake of Barker *v. Wingo,*[64] Congress clearly was disconcerted over the "amorphous quality" of the four-part test that the Supreme Court had formulated.65 Moreover, congressional lawmakers certainly could have construed the Court's declaration that, to

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[58] *See* H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. (19741, *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

[59] 404 U.S. 307, 320 (19711

[60] *See* H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

[61] *See* United States v. **Fox,** 788 F.2d 905, 908 (2d Cir. 1986) (in passing the FSTA, Congress gave effect to—but did not displace—the speedy trial guarantees of the Sixth Amendment).

[62] *See* H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7408.

[63] *See id.* at 7408-09.

[64] 407 U.S. 514 (1972); ***see*** *supra* notes 31-38 and accompanying text.

[65] LAFAVE & ISRAEL, *supra* note 30, § 18.3, at 691.

"hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period would require this Court to engage in legislative or rulemaking activity,'' as an invitation to draft legislation. This invitation was especially enticing because Congress—more than the courts—undoubtedly was concerned with the societal interests that the Sixth Amendment promoted,[66] but that the *Barker* Court only had acknowledged.

Congress reacted to *Barker* by lamenting about the prejudices that a pretrial detainee faces, as well as the ancillary societal costs attributed to pretrial detention. This reaction was predictable because the Supreme Court declined to adopt a *Barker* factor that would have differentiated a pretrial detainee from a similarly situated defendant who retained his or her freedom pending trial. Significantly, the speedy trial rules set out in *Barker, United States v. Marion,*[67] and *United States v. Lovasco*[68] require courts to consider the prejudice to the defendant's case more seriously than prejudice to the defendant's liberty. Furthermore, because *Barker* requires a balancing test, courts need not rely on prejudice to physical liberty—that is, pretrial incarceration—as a trigger for heightened scrutiny of speedy trial compliance.69 This was a deficiency in *Barker* that Congress apparently sought to remedy by adopting the FSTA.

The only form of prejudice that all defendants suffer with potential equality is the anxiety and concern that a presumptively innocent person may suffer while awaiting his or her first chance at exoneration.[70] On the other hand, the potential magnitude of each of the other forms of prejudice71 increases dramatically once the

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[66]*See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7401, 7408 (noting that speedy trials substantially reduce the prison-related costs to society caused by excessive pretrial incarceration).

[67]404 U.S. 307 (1971);*see* supra notes 13-16 and accompanying text.

[68]431 U.S. 783 (1977);*see* supra notes 17-22 and accompanying text.

[69]*Cf.* Moore v. Arizona, 414 U.S. 25, 26 (1973) (holding that, although courts must consider prejudice, an actual finding of prejudice is not required for a determination that the government violated the defendant's speedy trial rights).

[70]*Cf.* Turner v. Estelle, 515 F.2d 853, 859 (5th Cir. 1975). In *Turner,* the defendant already was incarcerated for first degree murder. He asserted a speedy trial claim on a separate robbery charge, basing his argument, in part, on the prejudicial effects of a four-year delay. *Id.* at 854-55. The *Turner* court doubted the need to protect a pretrial detainee from the "anxiety and concern . . . and public obloquy" because the defendant "suffered no prejudice . . . because he was in prison anyway." Referring to these indicia of prejudice, Judge Ainsworth noted that "we doubt that these further clouded Turner's mood while he was in death row for multiple murders." *Id.* at 859.

[71]*See* H.R. REP. No. 93-1508, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7401. 7408.

government has incarcerated an accused.[72] In passing the FSTA, Congress recognized that a statutory mechanism to guard against such increased prejudice is integral to the Sixth Amendment's speedy trial guarantees. Consequently, the FSTA's mandate that pretrial detainees receive priority not only is critical to the underlying statutory speedy trial scheme, but also expresses a constitutional standard for Sixth Amendment speedy trial rights that is no less important than the Supreme Court's decision in Barker.73

IV. Speedy Trial in the Military

Although the right to a speedy trial is constitutional,[74] the *Manual* codifies the rule with relative precision.75 The provisions of R.C.M. 707 and Article 10, as well as the severe sanction for violating them—namely, dismissal of the affected charges—set higher standards for ensuring that an accused enjoys a speedy trial than the Sixth Amendment requires.76 Moreover, these higher standards emphasize the military's objective of operating an expeditious justice system. Both the government and an accused have a substantial interest in expediting court-martial proceedings and in avoiding intolerable delays.77 The military speedy trial rules manifest the legal axiom that a service member accused of an offense requires just as much protection as a civilian requires against the government's delaying his or her day in court.[78] Furthermore, the need for such a rule in the military is heightened by the need to prevent unlawful command influence—or even the appearance of unlawful command influence—from interfering with the pretrial timetable.

Because of these substantial interests, compliance with speedy trial rules is one of the most hotly litigated trial issues at courts-

[72] *Cf.* ***id.*** Arguably, the loss of evidence or the unavailability of witnesses caused by the passing of time also may be a prejudice suffered equally by detained and free defendants alike. Incarceration, however, clearly hinders a defendant's ability to contact witnesses and gather evidence throughout the pendency of a case. ***Id.*** Accordingly, a pretrial detainee generally has a diminished opportunity to memorialize testimony and evidence that may be useful to his or her defense, should the original forms of such evidence and testimony fail to meet the test of time.

[73] Congress is no less capable of—nor less responsible for—formulating laws necessary to enforce the Constitution than is the Supreme Court or the President.

[74] ***See*** U.S. CONST. amend. 6; ***see*** *also* ***id.*** amend. V, ***supra*** notes 12-49 and accompanying text.

[75] ***See*** MCM, 1984, ***supra*** note 9, R.C.M. 707 (C5, 15 Nov. 1991).

We e United States v. King, **30** M.J. 59, 62 n.5 (C.M.A. 1990) (citing United States v. Powell, 2 M.J. 6 (C.M.A. 1976); United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973)).

[77] ***See*** United States v. Rachels, 6 M.J. 232 (C.M.A. 1979).

[78] ***See*** United States v. Maresca, 26 M.J. 910 (N.M.C.M.R 19881, ***review granted in part***, 27 M.J. 475 **(C.M.A.** 1989).

martial. Nevertheless, the proliferation of speedy trial statutes and rules has made the appearance of a pure Sixth Amendment speedy trial claim unusual in courts-martial. Accordingly, prior to the recent change to the *Manual,* many military practitioners had grown accustomed to litigating issues arising principally from three so-called speedy trial rules. The first was the 120-day rule contained in the former R.C.M. 707(a), which required the government to bring an accused to trial no later than the earlier of 120 days after preferral,[79] or 120 days after the government first restricted,[80] arrested,[81] or confined[82] the individual.[83] The second rule was the ninety-day limit imposed by the former R.C.M. 707(d), which prohibited the pretrial arrest or confinement of an accused in excess of ninety days. The third and final rule was the *Burton* ninety-day rule,[84] which stated that a court-martial shall presume that the government has violated the "immediate steps" requirement of UCMJ Article 10 if it has detained the accused in pretrial arrest or confinement for more than ninety-days. In most cases, these rules provided a sufficiently comprehensive framework for analyzing a speedy trial issue to avoid a court's taking cognizance of the issue as a constitutional claim.

A. *Speedy Dial or Speedy Release?*

Because, taken together, they generally imposed a much stricter standard than the Sixth Amendment right to a speedy trial, interpreting these three rules predominated speedy trial issues that arose during the pendency of a court-martial. The principal benefit of these rules was that they imposed objective, measurable, and relatively easy-to-apply speedy trial requirements. Nevertheless, a trial practitioner's acclimation to these provisions often was misplaced. Specifically, an inexperienced trial counsel easily could assume that if the accused was not in pretrial arrest or confinement, the government simply had to bring him or her to trial within 120 days. This assumption may have been safe under most circum-

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[79] MCM, ***supra*** note 9, R.C.M. 707(a) (C3, 1 June 1987) (current version is R.C.M. 707(a) (C5, 15 Nov. 1991)).

[80] *Id.* R.C.M. 304(a)(2).

[81] *Id.* R.C.M. 304(a)(3).

[82] *Id.* R.C.M. 304(a)(4).

[83] *Id.* R.C.M. 707(a)(2) (C3, 1 June 1987) (current version is R.C.M. 707(a) (C5, 15 Nov. 1991)).

[84] *See* United States v. Burton, 44 C.M.R. 166, 177 (1971). Actually, *Burton* prescribed a three-month rule that the Court of Military Appeals defined more precisely as 90 days in United States v. Driver, 49 C.M.R. 376 (1974).

stances, but mere compliance with the 120-day time limit of R.C.M. 707(a) never has immunized the government totally from a Sixth Amendment speedy trial claim.[85]

Similarly, a neophyte trial counsel easily could have believed that if the accused was in pretrial arrest or confinement, the government had only ninety days to get to trial. Harboring this belief also may have been prudent in most situations because it undoubtedly enhanced the government's sense of urgency in processing a detainee's court-martial charges. Nothing in R.C.M. 707(d), however, actually required the government to bring an accused to trial before the end of the rule's ninety-day period. To the contrary, a careful reading of the *Manual's* former speedy trial provisions reveals that the R.C.M. 707(d) ninety-day rule was not a pure speedy trial rule at all. That rule stated the following:

> When the accused is in pretrial arrest or confinement under R.C.M. **304** or 305, immediate steps shall be taken to bring the accused to trial. *No accused shall be held in pretrial confinement in excess of 90 days* for the same or related charges. . . . The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.[86]

Remarkably, the government easily could avoid a violation of this rule by releasing an accused from pretrial arrest or confinement just before the expiration of the ninety-day period. Furthermore, if the prosecution took this step to avoid an R.C.M. 707(d) violation, the government still would have had the benefit of thirty additional days to prepare for trial.

Essentially, the former R.C.M. 707(d) purported to impose two speedy trial standards on the government: (1) the government had to take "immediate steps to bring a detained person to trial; and (2) the government could not hold an individual in pretrial arrest or confinement for more than ninety days. Accordingly, the plain lan-

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[85] *See* Barker v. Wingo, 407 U.S. 514 (1972); ***supra*** notes 31-38 and accompanying text. Although the ***Barker*** Court acknowledged that the length of the pretrial delay could "trigger" the test, it specifically clarified that it could not establish a quantifiable test to determine constitutional speedy trial rights for all situations. ***Barker,*** 407 U.S. at 530. Consequently, in a rare case in the military, if the government can give no legitimate reason for an extended pretrial delay, the government still is unprepared to present its case after the accused has demanded immediate trial, and the accused can demonstrate clear prejudice, the accused could prevail on a Sixth Amendment speedy trial claim even though the case is less than 120 days old. ***See*** DEP'T OF ***ARMY,*** PAMPHLET 27-173, LEGAL SERVICES: TRIAL PROCEDURE, para. 15-5, at 97 (31 Dec. 1992) [hereinafter DA PAM. 27-173].

[86] MCM, ***supra*** note 9, R.C.M. 707(d) (C3, 1 June 1987) (emphasis added) (current version is R.C.M. 707 (C5, 15 Nov. 1991)).

guage of R.C.M. 707(d) did not impose an empirical limitation on the time that the government could expend in preparing its case for court-martial. Instead, the ninety-day rule of the old R.C.M. 707(d) merely limited the length of a person's pretrial arrest or confinement.

Because practitioners easily could confuse the actual nomenclatures and effects of the *Manual's* so-called speedy trial rules, these provisions perhaps are best understood if considered for what they are-executive orders. By including the former R.C.M. 707(d) ninety-day rule and the other provisions of R.C.M. 707 in the *Manual,* the President effectively had imposed three standing orders on all officials responsible for processing court-martial charges on behalf of the government: (1) bring every case to trial within 120 days; (2) if the accused is in pretrial arrest or confinement, take immediate steps to prepare for trial—that is, do not fail to comply with UCMJ Article 10; and **(3)** if a person has been deprived of liberty for more than ninety days, either proceed to trial or emancipate that person immediately.

Consequently, the two components of the old R.C.M. 707(d) were substantial adjuncts to military speedy trial law, The first prong of old Rule 707(d) reiterated—and thereby reemphasized—the "immediate steps" requirement that already appeared in UCMJ Article 10. Likewise, the rule's ninety-day time limit was not only a speedy trial provision, but also—and more importantly—a ninety-day release rule. Accordingly, while the primary objective shared by the 120-day rule, the *Burton* ninety-day rule, and the "immediate steps" rule certainly was to protect an accused's right to a speedy trial, the language of the *Manual's* ninety-day rule actually manifested a primary objective of protecting a presumptively innocent service member's right to liberty. The former R.C.M. 707(d), therefore, vindicated the precise physical liberty interests that are at the heart of the FSTA and the Sixth Amendment's Speedy Trial Clause.

B. The Detainee's Right to a "Speedier" Dial

In addition to their accustomed views of the speedy trial rules, many trial practitioners would agree that an accused in pretrial arrest or confinement should enjoy a right to a "speedier" trial than an identically situated accused who is awaiting trial on his or her own recognizance. The *Manual's* former ninety-day rule implicitly recognized a detainee's right to a "speedier trial" by codifying a thirty-day difference between the 120-day rule and the ninety-day rule. Moreover, notwithstanding their decision to eliminate the *Manual's* separate ninety-day release rule, the drafters of Change **5** to the

Manual acknowledged that the government should process charges against an individual in pretrial arrest or confinement with greater urgency than it does against a similar, but undetained, person.[87]

Even before the President promulgated Change 5 to the *Manual*, none of the added protections contained in the *Manual's* speedy trial rules effectively could assure a detained person's right to a speedier trial. The R.C.M. 707(d) "immediate steps" rule, which merely reiterated the "immediate steps" language of Article 10, failed to provide complete and certain protection because it affixed no objective criterion to assist a court in determining the meaning of "immediate steps." Additionally, the R.C.M. 707(a) 120-day rule was ineffective because it provided no relative benefit based on an accused's pretrial detention status. Similarly, the ninety-day "speedy release" rule of R.C.M. 707(d) could not directly assure a speedier trial because it did not address the temporal urgency with which the government proceeded to trial. The *Burton* rule, on the other hand, could accelerate the processing of charges because it rewarded a burden-shifting procedural advantage to an accused whom the government already had detained for ninety days.[88]

By promulgating Change 5 to the *Manual*, however, the President eliminated the already sparse speedy trial protections that a pretrial detainee had at his or her disposal. No longer can an incarcerated accused invoke the R.C.M. 707(d) "immediate steps" or ninety-day rules; instead, the detained service member is subject to the same speedy trial standards as his or her unincarcerated counterpart. The advent of this new R.C.M. 707 "universal" 120-day speedy trial rule only recently elicited an authoritative response from the judiciary. Remarkably, in *United States v. Kossman*,[89] the Court of Military Appeals answered the President's decision to eliminate the administrative priority accorded to a pretrial detainee's case by eliminating the pretrial detainee's military-judicial speedy trial protections as well. Accordingly, in a period of a little over

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[87] *See* MCM, *supra* note 9, R.C.M. 707(a)(1) discussion, at 7 (C5, 15 Nov. 1991) ("Priority shall be given to persons in arrest or confinement"). This passage from the discussion to R.C.M. 707(a)(1), however, has no binding effect whatsoever. *See infra* note 121. Military courts generally have required the government to proceed with greater dispatch on cases in which an accused is in pretrial detention. *See* Carroll J. Tichenor, *The Accused's Right to Speedy Trial in Military Law,* 52 MIL. L. REV. 1, 20 (1971).

[88] *See* United States v. Cook, 27 M.J. 212 (C.M.A. 1988); United States v. McCallister, 24 M.J. 881 (A.C.M.R. 1987), *rev. granted in part*, 26 M.J. 171 (C.M.A. 1988), *affirmed*, 27 M.J. 138 (C.M.A. 1988).

[89] 38 M.J. 258 (C.M.A. 1993).

twenty-six months the President and the Court of Military Appeals extracted the teeth that they once had added to Article 10.[90]

Even though the Court of Military Appeals has decided to put the Burton ninety-day rule to rest, Congress's silence on the military speedy trial issue apparently means that the "immediate steps" requirement of UCMJ Article 10 retains its vitality.[91] Nevertheless, Article 10, standing alone, never has been a panacea for avoiding speedy trial violations in the military. The speedy trial interests promoted by Article 10—like the interests promoted by any statute—require objective executive rulemaking and a coherent body of case law if those who administer the military justice system are to remain tractable. Because the R.C.M. 707(d) "immediate steps" rule encouraged the government to move swiftly (or risk a dismissal under R.C.M. 707(e)) and the Burton ninety-day rule encouraged the government to move swiftly (or risk having the substantial burden of proof on a speedy trial motion) a pretrial detainee always had a distinct procedural advantage. In other words, relative to an undetained service member who was pending trial, an incarcerated accused stood a better chance of prevailing on a speedy trial motion to dismiss at any time during the pendency of his or her pretrial detention period. Unfortunately, now that the R.C.M. 707(d) "immediate steps" rule and the Burton rule have perished, an accused in pretrial incarceration has no regulatory or military-judicial advantage over an accused who is free awaiting trial. Similarly, but for the very slight consideration accorded to incarceration under the Barker *v.* Wingo test,[92] an accused in pretrial detention has no compulsory judicial advantage over an accused who is free awaiting trial—that is, no court is obliged to consider pretrial detention as a talismanic speedy trial factor.[93]

C. The case *of* United States v. Kossman

1. Analyzing the Kossman Decision—In Kossman, military law enforcement officials detained a Marine Corps private in pretrial confinement for 110 days, 102 of which were attributable to the

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[90]*See id.* at 259. Change **5** to the *Manual* was effective on July 6, 1991; the Court of Military Appeals rendered its decision in *Kossman* on September 29, 1993. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, § 13-3(C)(2), at 439 (3d ed. 1992). "The Court of Military Appeals decision in *United States v. Burton* added teeth to the Article 10 provisions which provide no specific time limits for bringing an accused to trial." *Id.* (footnote omitted).

[91]*See* The Military Justice Act of 1982, S. 2521, 97th Cong., 2d *Sess.* (1982) (latest apparent attempt to consider statutory structure of speedy trial rights in the military, which resulted in no change).

[92]407 U.S. 514 (1972).

[93]*See id.* at 533.

prosecution.[94] Based on the government's failure to meet its burden of showing diligence in accordance with United States *v. Burton*,[95] the trial judge dismissed certain charges and specifications.[96] The government appealed to the Navy-Marine Corps Court of Military Review[97] and—in an ironic departure from one of its earlier attempts to overrule *Burton*[98]—it affirmed.[99] The Kossman case arrived at the Court of Military Appeals as the following certified question from The Judge Advocate General of the Navy: "Whether the Navy-Marine Corps Court of Military Review correctly determined that the military judge was bound to apply [the Court of Military Appeals'] holding in United States *v.* Burton in resolving appellee's speedy trial motion instead of the President's comprehensive speedy trial scheme contained in RCM 707."[100]

Judge Cox, writing for the majority,[101] answered the certified question in the negative.[102] The court based its decision to discard the Burton ninety-day rule, in lieu of the "President's comprehensive speedy trial scheme,'' on four conclusions that it derived from the evolution of speedy trial law in the military. First, the Kossman majority noted that, since Burton, the President has changed the military magistrate system so that, "pending courts-martial, military magistrates and judges[—not just commanders—]now hold keys to confinement facilities and brigs. . . ."[103] Second, the court

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[94]*Kossman,* 38 M.J. at 259. The parties agreed with the trial judge's computation of the pretrial delay and with the judge's determination that the delay did not trigger the standards set out by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972). *Kossman,* 38 M.J. at 259; ***see*** *supra* text accompanying note 33.

[95]44 C.M.R. 171, 172 (C.M.A. 1972).

[96]*Kossman*, 38 M.J. at 259.

[97]*Id.* The government appealed in accordance with UCMJ Article 62, which permits the United States to appeal a ruling by a court-martial empowered to grant a punitive discharge if that ruling effectively terminates the proceedings.

[98]***See*** United States v. Calloway, 23 M.J. 799, 800-01 (N.M.C.M.R. 19861; United States **v.** Ivester, 22 M.J. 933, 937 (N.M.C.M.R. 1986) (calling *Burton* rule "anachronistic"in light of R.C.M. 707(d) 90-day rule).

[99]*Kossman,* 37 M.J. 639 (N.M.C.M.R. 1992), *overruled by* 38 M.J. 258 (C.M.A. 1993).

[100]*Kossman,* 38 M.J. at 258 (citation omitted); ***see*** UCMJ art. 67(a)(2) (1988) (directing the Court of Military Appeals to review the record of a case before a court of military review when the judge advocate general of the respective service dispatches the record, raising specific issues of law).

[101]***See*** *Kossrnan,* 38 M.J. at 258. In *Kossman,* Judges Crawford and Gierke concurred with Judge Cox's opinion; Judges Sullivan and Wiss wrote separate dissenting opinions.

[102]*Id.* at 262.

[103]*Id.* at 260 (dangling modifier corrected); ***see*** MCM, *supra* note 9, R.C.M. 305(i)(2), (i)(5), (j)(1) (directing duly appointed, "neutral and detached officers" and judges to review the reasons for pretrial confinement).

pointed out that courts-martial must award sentencing credit for time served in pretrial confinement.[104] Third, the majority observed that the court never had found a Burton violation in any case in which the government had satisfied R.C.M. 707.[105] In making this observation, the court apparently was asserting that the Burton rule, as applied, was effectively redundant to the R.C.M. 707(d) ninety-day rule.[106] Finally, Judge Cox declared that the President's decision to amend R.C.M. 707 in 1991—an amendment which, inter alia, eliminated the ninety-day pretrial confinement rule of the former R.C.M. 707(d)—changed the "landscape" of speedy trial law and constituted a responsible act in an area in which the Chief Executive had clear authority.[107] Evidently, the court concluded that Burton no longer accommodated the President's design to simplify regulatory speedy trial procedures.[108] Consequently, *Kossrnan* essentially held that executive rulemaking transcended the protections that the Burton ninety-day rule provided to accused awaiting trial in pretrial confinement.

2. Why the Kossman Decision *Is* Faulty — Notwithstanding the Court of Military Appeals's apparent desire to streamline military speedy trial law, all four of the conclusions upon which it based its Kossman ruling are misplaced. First, a review of the reasons for confinement by a military magistrate or judge has no effect on the

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[104]*Kossman*, *38* M.J. at 260; ***see*** United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984) (providing day-for-day postconviction sentence credit for time spent in pretrial confinement); MCM, *supra* note 9, R.C.M. 305(j)(2), (k) (providing additional day-for-day postconviction sentence credit for any portion of time spent in pretrial confinement that was in violation of R.C.M. 305).

[105]*Kossman*, 38 M.J. at 260. The court noted that "the particular periods of time that satisfied the R.C.M. 707 exclusions also overcame the *Burton* presumption." *Id.*

[106]*Id.* (citing United States v. Carpenter, 37 M.J. 291, 299 (C.M.A. 1993); United States v. King, 30 M.J. 59, 66 & n.7 (C.M.A. 1990)).

[107]*Id.* at 261. The *Kossman* court stated that it formulated the *Burton* 90-day rule "in a procedural vacuum, without the benefit of Presidential input." *Id.* The court presumably concluded that, now that the President has provided his input in the form of a regulatory speedy trial rule, the "rough-and-ready rule of thumb (the *Burton* rule) now merely aggravates an already complicated subject." *Id.* Unfortunately, the court declined to aver the reasons for its belief that the "landscape" of speedy trial law has become complicated. The *Kossman* opinion seems to beat around the bush on this issue. Perhaps the court was concerned that *Burton* provided fertile ground for unnecessary speedy trial litigation. On the other hand, the Court of Military Appeals may have felt that the military justice system had become sufficiently accustomed to regulatory speedy trial rules and that a reassertion of the *Burton* rule thereby would be an encroachment on presidential turf. Nevertheless, Judge Wiss's dissenting opinion intimates that "no fewer than 10 Judges of [the Court of Military Appeals] and . . . countless judge advocates" had weeded through *Burton* issues "without undue difficulty." *Id.* at 262 (Wiss, J., dissenting).

[108]*Id.* at 260; **see** UCMJ art. 36(a) (1988) (authorizing the President to establish pretrial, trial, and posttrial procedures for courts-martial).

speed at which the government ultimately proceeds to trial. Although the Manual's pretrial confinement review provisions undoubtedly protect an accused from unlawful incarceration, they do nothing to promote a speedy trial after an appropriate official has reviewed and affirmed a commander's decision to place a service member under pretrial restraint.[109] Indeed, R.C.M. 305—cited by the court in Kossman—is devoid of any language that confers on a military magistrate or military judge the authority to order the release of a confined service member based on violation of that service member's right to a speedy trial.[110] Furthermore, even if the rule granted these powers, other temporal restrictions would render the authority meaningless in practice.[111]

Consequently, while the military magistrate system provides an accused with procedural due process safeguards, it does nothing to reduce the length of pretrial confinement by assuring a speedier trial. More importantly, the bases for holding a service member in pretrial confinement actually make the government complacent, not diligent. Specifically, if a commander has founded his or her decision to put an accused in pretrial confinement on a valid belief that the accused may engage in serious criminal misconduct, the government may be reticent to proceed to trial if any risk of acquittal

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[109] *Cf.* United States v. Rexroat, 38 M.J. 292, 295-97 (C.M.A. 1993) (holding that military magistrates must review pretrial confinement reasons within 48 hours of arrest) (enforcing County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991)). Arguably, having a magistrate review the reasons for pretrial detention within 48 hours of arrest provides little comfort to a presumptively innocent service member who now could wait at least 118 additional days in confinement before the government is required to provide him or her with an opportunity for vindication.

[110] *See* ***generally*** MCM, ***supra*** note 9, R.C.M. 305. Actually, in his or her initial review, the military magistrate considers only the adequacy of the reasons for confinement. *Id.* R.C.M. 305(i). In addition to confirming the commander's reasonable grounds for believing that the prisoner committed an offense triable by court-martial and that forms of restraint less severe than confinement will not be adequate, the magistrate need only affirm the commander's belief that the accused is a flight risk or likely will engage in serious criminal misconduct. *Id.* R.C.M. 305(h)(2)(B). Likewise, the rule gives a military judge the authority to order a prisoner released only if the judge finds that the reasons for confinement were not, or no longer are, valid. *Id.* R.C.M. 305(j)(1).

[111] *See id.* R.C.M. 305(j) (referral of charges triggers military judge's authority to review the reasons for confinement); R.C.M. 602 (referral must occur at least five days before general court-martial and three days before special court-martial); R.C.M. 707(a)(2) (C5, 15 Nov. 1991) (trial must commence within 120 days of imposition of restraint); ***Rexroat*** 38 M.J. at 298 (magistrate must review reasons for confinement within 48 hours of arrest). Taken together, these rules provide the government with considerable leeway in proceeding to trial. The only time a magistrate needs to review the confinement order is within two days of incarceration. In addition, the military judge's review, which obtains only after referral, may occur as late as day 115 or 117 of incarceration, depending on the type of court-martial. Accordingly, notwithstanding the protections of the military magistrate system, the accused in pretrial confinement may serve between 113 and 115 days in a veritable judicial-review blackout period.

exists. Paradoxically, as the likelihood of a court's acquitting a dangerous accused increases, the government's incentive to expedite the case — and the accused's release — arguably decreases.

Kossman also incorrectly relied on the effect that sentencing credit has on an accused's right to a speedy trial. Actually, the concept of sentencing credit is an affront to speedy trial law. Both the military and the civilian criminal justice systems emphasize that pretrial incarceration is not punitive.[112] A sentence to posttrial confinement, on the other hand, is definitively punitive. Accordingly, the concept of giving a convicted service member sentencing credit for pretrial confinement either must violate the principle that a sentence shall be punitive or must violate the principle that pretrial confinement shall not be punitive.[113] Finally, the drafters of R.C.M.

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[112] *See* UCMJ art. 13 (1988) ("No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement upon him be any more rigorous than the circumstances required to insure his presence."); United States v. Bayhand, 21 C.M.R. 84, 88 (C.M.A. 1956) ("confinement itself. . . is penal servitude . . . [; therefore,] if the restraint [rises to a level at which it is] more than is needed to retain safe custody, the unnecessary restrictions [constitute] punishment").

[113] *See* United States v. Salerno, 481 U.S. 739 (1986). *Salerno* exposes a number of paradoxes between the concepts that support the need for pretrial confinement and the right to a speedy trial. The *Salerno* Court held that pretrial detention under the Bail Reform Act of 1984, 18 U.S.C. § 3141 (1988), is not punitive. The Court pointed out that Congress merely intended to use pretrial detention as a means for attaining the "legitimate regulatory goal" of "preventing danger to the community." *Salerno*, 481 U.S. at 746-47. If the Court's reasoning is correct, Congress may as well pass a statute that allows law enforcement officials to lock up all allegedly dangerous individuals based on administrative proceedings, rather than criminal trials. Just as the military often finds that administratively separating a problem service member is easier than prosecuting him or her in hopes of obtaining a punitive discharge, many communities would welcome a streamlined process in which the government administratively separates problem people from the rest of society.

The *Salerno* Court also noted that the Speedy Trial Act, 18 U.S.C. § 3161 (1988), placed stringent time limitations on the duration of pretrial confinement. In addition, the Court implied that, at some point, the duration of pretrial confinement might become "excessively prolonged, and therefore punitive." *Salerno*, 481 U.S. at 747 n.4. The justices, however, declined to intimate what factors a court should examine to determine whether pretrial detention is tantamount to punishment. Moreover, the Court gave no clue as to the remedy for punitive pretrial detention. Presumably, the victim of pretrial punishment deserves the same remedy — namely, dismissal — as the victim of a speedy trial violation. Certainly the right to a speedy trial must guarantee to a presumptively innocent defendant that the government will process his or her case with sufficient diligence to ensure that the opportunity to vindicate occurs before the government proceeds with a punishment.

The most compelling argument in *Salerno* appears in Justice Marshall's dissent, in which he posits the following rhetorical question: If the idea of administrative detention is valid, and a dangerous individual is held pending trial, but later acquitted, "[m]ay the Government continue to hold the defendant in detention based upon its showing that he [or she] is dangerous?" *Id.* at 763 (Marshall, Brennan, JJ., dissenting). Justice Marshall's example epitomizes the absurdity in formulating a dichotomy between punitive and nonpunitive confinement. More importantly, *Salerno*, in general, demonstrates why courts should not create legal fictions as para-

305 never intended sentencing credit as a means of enforcing the speedy trial rules. Sentencing credit merely deters military officials from violating the rules governing the propriety of—as opposed to the length of—pretrial confinement.[114]

Kossman's intimation that the *Burton* ninety-day rule was redundant is equally unconvincing. First, in two passages in the *Kossman* opinion, the majority emphasizes that the Court of Military Appeals created the *Burton* ninety-day rule to enforce the speedy trial provisions of UCMJ Article 10.[115] The court, however, effectively concedes that Article 10 does not require the President to promulgate a speedy trial rule to implement the "immediate steps" rule.[116] Instead, *Kossman* points out that R.C.M. 707 is a discretionary exercise of the powers to prescribe pretrial, trial, and post-trial procedures, which Congress delegated to the President under UCMJ Article 36(a).[117] Accordingly, while R.C.M. 707 may delineate a "comprehensive speedy trial scheme,"[118] it is not required as an Article 10 enforcement mechanism. Therefore, even if the court's interpretation of the present R.C.M. 707 was correct, it only would warrant the military judiciary's exercising considerably more deference in employing the *Burton* standard; it certainly would not justify the court's drastic action in abandoning the *Burton* rule altogether.

Finally, the *Kossman* court's explanation that the *Burton* rule was merely a crude judicial measure, meant to fill an ephemeral procedural deficiency that the President now has responsibly cor-

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meters for measuring constitutional rights. Finally, accepting the fiction of a punitive-nonpunitive dichotomy creates absurd results at courts-martial. Offsetting punitive confinement with nonpunitive confinement necessarily gives the convicted service member a windfall by diluting the severity of the punishment that the court-martial meted out. In addition, it deprives society of the rehabilitative effects that punitive confinement has on the convicted service member—rehabilitative effects that ultimately will benefit the community when he or she is released. Finally, sentencing credit has no bearing on the speed at which the government proceeds to trial.

[114] *See* MCM, *supra* note 9, R.C.M. 305 analysis, app. 21, at A21-18. Sentencing credit clearly cannot be the answer for illegal pretrial confinement and other transgressions, such as speedy trial violations, because it only recompenses actual criminals—and then, only criminals whom a court-martial has sentenced to a punishment more severe than the confinement they already have served. Perhaps the best method of reconciling this unusual remedy with common notions of fairness is to give "get out of jail free" cards to those whom a court-martial acquits.

[115] *Kossman*, *38* M.J. at 259 ("the '*Burton* presumption' was conceived of as a mechanism to enforce Article 10"); *id.* at 261 *("Burton* was a tool for effectuating Article 10").

[116] *Id.* at 260-61.

[117] *Id.* at 260; *see* UCMJ art. 36(a) (1988) (authorizing the President to prescribe procedures consistent with the principles of law generally recognized by federal criminal courts, as long as those procedures are consistent with the provisions of the UCMJ).

[118] *Id.* at 258.

rected, is unpersuasive. Actually, the President's decision to eliminate the ninety-day release rule and the "immediate steps" rule of the former R.C.M. 707(d), made the *Burton* ninety-day rule even more important to the enforcement of a pretrial detainee's right to a speedy trial. Significantly, the Court of Military Appeals emphasized that it created the *Burton* rule to enforce Article 10—a statute that irrefutably confers additional speedy trial protections only on service members in pretrial restraint.[119] Nevertheless, *Kossman* declares that trial courts are bound by the "President's comprehensive speedy trial scheme," instead of *Burton,* in resolving subconstitutional speedy trial motions.[120] This is a remarkably curious result because, while the *Burton* rule guaranteed augmented speedy trial protections to pretrial detainees, nothing in the "President's comprehensive speedy trial scheme" mandates that the prosecution expedite the cases of incarcerated service members.[121] Accordingly, had the court decided to scrap the *Burton* rule when R.C.M. 707(d) protected pretrial detainees with an "immediate steps" rule and a ninety-day release rule, its actions may have been more understandable. Its decision to dispense with the rule now, however, is perplexing.

Before taking its bold step in *Kossman,* the Court of Military Appeals should have scrutinized the purported comprehensiveness of the military's present regulatory speedy trial scheme. If it had

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[119]*See* UCMJ art. 10 (1988) ("When any person subject to this chapter *is* ***placed*** *in* ***arrest*** *or* ***confinement*** prior to trial, immediate steps shall be taken . . . .") (emphasis added). Unless the government holds the accused in some form of pretrial restraint, he or she enjoys no protection under Article 10. *Cf.* United States v. Nelson, 5 M.J. 189 (C.M.A. 1978) (confinement of some duration is necessary to trigger Article 10); United States v. Rachels, 6 M.J. 232 (C.M.A. 1979) (retention of service member past his or her expiration of term does not rise to restraint sufficient to trigger Article 10); United States v. Williams, 37 C.M.R. 209 (C.M.A. 1967) (restraint must be lengthy or onerous to be tantamount to restraint sufficient to invoke Article 10 protections). Additionally, Congress passed Article 10, in part, because the military justice system has no provision for posting bail in lieu of pretrial confinement. ***See*** United States v. Mock, 49 C.M.R. 160 (A.C.M.R. 1974). Accordingly, Congress never intended an undetained accused to receive any pendant protections from Article 10. ***See*** *also* **SCHLUETER,** ***supra*** note 91, § 13-3(C)(2), at 438-39 n.53.

[120]*Kossman, 38* M.J. at 258, 262.

[121]***See generally*** MCM, ***supra*** note 9, R.C.M. 707 (C5, **15** Nov. 1991). The discussion to R.C.M. 707 states, "Priority shall be given to persons in arrest or confinement." ***Id.*** R.C.M. 707(a)(1) discussion, at 7. Discussions to *Manual* provisions, however, expressly are not directory in nature. ***Id.*** preamble, para. 4, discussion (discussions are not official views of the military departments; nor do they constitute rules or any other exercise of authority of the United States Government). More pointedly, the statement that "[p]riority will be given to persons in arrest or confinement" is, at best, precatory. This comment, like all discussions to the *Manual,* "do[es] not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States) . . . . [and f]ailure to comply . . . does not, of itself, constitute error . . . ." ***Id.***

done so, the court would have found that the current version of R.C.M. 707 fails to fulfill its drafters' intent. For instance, the drafters of the Manual assert that they based R.C.M. 707 on the FSTA[122] and the ABA Standards for Criminal Justice *(ABA Standards)*.[123] Unlike the FSTA and the ABA Standards, however, R.C.M. 707 does not mandate a shorter speedy trial period for persons held in pretrial confinement than for those at liberty pending trial.[124] Accordingly, in the absence of the Burton ninety-day rule, pretrial detainees in the military no longer enjoy the right to a "speedier" trial—a right that the Sixth Amendment, UCMJ Article 10, the FSTA, and the ABA Standards recognize, but that the present R.C.M. 707 does not.

D. Conclusion

The new speedy trial provision that appears in Change 5 to the Manual manifests indifference to a service member in pretrial confinement. In addition, with the demise of the Burton rule, a service member in pretrial arrest or confinement has virtually no assurances that his or her trial will commence any earlier than a similarly situated undetained accused.[125] Consequently, the speedy trial mechanisms that the military justice system now has in place effectively deprive service members in pretrial detention of the traditional methods for enforcing the speedy trial rights that the Sixth

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[122]18 U.S.C. §§ 3161-3174 (1988) (imposing time limits on the period between arrest or summons and trial in federal criminal cases).

[123]*See* STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, speedy trial standards **12-2.1,** 12-2.2 (American Bar Ass'n 1986) [hereinafter ABA STANDARDS].

[124]*See* 18 U.S.C. § 3164(a)(1) (1988) ("Thetrial or disposition of cases involving . . . a detained person who is being held in detention solely because he is awaiting trial . . . shall **be** accorded priority"); ABA STANDARDS, *supra* note 123, pretrial release standard 5.10 ("Everyjurisdiction should adopt, by statute or court rule, a time limitation within which defendants in custody must be tried which is shorter than the limitation applicable to defendants at liberty pending trial."). Interestingly, the "by statute or court rule" language in Standard 5.10 would seem to mandate the *Burton* ninety-day rule even in the presence of the former R.C.M. 707(d) ninety-day release and "immediate steps" rules. Nevertheless, while the former R.C.M. 707 apparently met the *ABA Standards*, the present version of the rule does not.

[125]*See also Kossman,* 38 M.J. at 261-62. *Kossman's* validity is independently suspect because it urges military judges to consider arguably inappropriate factors, such as "crowded dockets, unavailability of judges, and attorney caseloads," when they resolve Article 10 speedy trial issues. *Id.* While the operational necessities of the military always have weighed heavily in balancing *regulatory* speedy trial rights with the practical interests involved in administering military justice, balancing "judicial impediments" against an accused's *statutory* rights to a speedy trial is questionable. The FSTA, for instance, expressly states that a judge shall not exclude from speedy trial computations any time periods for continuances granted "because of general congestion of the court's calendar." 18 U.S.C. § 3161(h)(8) (1988). One commentator has noted that "[tlhisprovision . . . is the heart of this statutory scheme." LAFAVE & ISRAEL, *supra* note 30, § 18.3(b), at 693.

Amendment and Article 10 were meant to guarantee. Accordingly, practitioners, judges, and convening authorities must employ other features of the military justice system to vindicate these important rights. **An** accused service member in pretrial detention, therefore, now has only negligible means to assure that the government is processing his or her charges faster than an identically situated accused who is enjoying pretrial freedom.

First, the service member may move to dismiss based on the government's failure to satisfy UCMJ Article 10's "immediate steps" mandate. Specifically, an accused in pretrial confinement still can accrue the extreme remedy of dismissal if he or she demonstrates that the government purposefully, oppressively, or arbitrarily delayed trial.[126] Kossman, however, indicates that courts should use the "reasonable diligence" standard expressed in United States *v. Tibbs*[127] to resolve Article 10 speedy trial motions.[128] The Kossman court also saw "nothing in Article 10 that suggests that speedy-trial motions could not succeed where a period under 90—or 120—days is involved."[129] Nevertheless, to the extent Judge Cox believes that the Burton rule "virtually assured that no accused could ever prevail on an Article 10 motion if the pretrial confinement chargeable to the Government was less than 90 days,"[130] a court's obligation to apply the President's comprehensive speedy trial scheme contained in R.C.M. 707"[131] just as certainly assures that no accused ever will prevail on an Article 10 motion if the pretrial confinement chargeable to the government is less than 120 days. Indeed, the government's 102-day delay in Private Kossman's case enshrines this postulate. Accordingly, after Kossman, a service member in pretrial confinement is no more likely to prevail on a speedy trial motion based on Article 10 than if he or she were free and asserting the same motion based on R.C.M. 707.

In addition to an Article 10 motion, an incarcerated accused may assert a straight Sixth Amendment speedy trial claim based on Barker *v. Wingo*.[132] The Barker test, however, considers pretrial detention as just one of many prejudicial factors that a court must

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[126]*See* United States v. Parish, 38 C.M.R. 209 (1968).

[127]35 C.M.R. 322 (C.M.A. 1965).

[128]*See Kossman*, 38 M.J. at 262 (citing *Tibbs*, 35 C.M.R. at 325) ("touch stone for measurement of compliance with . . . [UCMJ] is not constant motion, but reasonable diligence in bringing the charges to trial"). The Court of Military Appeals first announced the reasonable diligence standard in *Parish*, 38 C.M.R. at 214.

[129]*Kossman*, 38 M.J. at 261.

[130]*Id.*

[131]*Id.* at 258.

[132]407 U.S. 514 (1972).

balance.[133] *Barker*, therefore, fails to compel a court to give a detainee greater speedy trial protection than a similarly situated, undetained accused. Moreover, even if the court finds that the government failed to take immediate steps under Article 10, the *Barker* test will tolerate a denial of a speedy trial motion if the three other balancing factors weigh against dismissal.[134] Consequently, a Sixth Amendment speedy trial motion offers no certain, additional relief to a accused merely because he or she is incarcerated while awaiting trial.

In the wake of *Kossman*, therefore, the military justice system has no distinct, objective mechanism for enforcing the Sixth Amendment right to a speedy trial and the important "immediate steps" mandate of UCMJ Article 10.[135] Nevertheless, the interests that the Article 10 and the Sixth Amendment rights to speedy trial seek to protect demand that the government process the cases of presumptively innocent military detainees with some degree of priority. Until *Kossman*, the *Burton* ninety-day rule served as the keystone for protecting these rights. Moreover, because an incarcerated accused rarely can be expected to obtain the empirical evidence necessary to prove that the government failed to give his or her case priority over other cases, the *Burton* presumption-shifting rule was not only appropriate, but also indispensable. Now, however, military practitioners must look elsewhere for methods to vindicate the speedy trial rights of service members whom the government has incarcerated pending trial. Three such methods may derive from renewed attention to UCMJ Article **33,** application of the FSTA to courts-martial, and revision of R.C.M. 707.

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[133] *See id.* at 526; *supra* notes 31-38 and accompanying text.

[134] *See Barker, 407 U.S.* at 526 (in assessing Sixth Amendment speedy trial issues, courts must balance the length of the delay, the reasons for the delay, the assertion of the right, and the prejudice to the defendant). For instance, even if the government failed to take immediate steps to try the accused, the court may find that no speedy trial violation occurred if the only prejudice suffer by the accused was incarceration, the accused never demanded speedy trial, and the length of the delay was not excessive under the circumstances.

[135] *See Kossman, 38* M.J. at 262 (Sullivan, C.J., dissenting) (the majority's decision "eviscerates this body of speedy trial law in favor of essentially unreviewable ad hoc decisions by military trial judges. The result is chaos"). The right to a speedy trial in the military is of such procedural importance that the appellate courts will find that a staff judge advocate's posttrial review of a case is inadequate if it fails to apprise the convening authority of a speedy trial issue litigated at trial. *See* United States v. Hagen, 9 **M.J.** 659 (N.M.C.M.R. 1980). Indeed, enforcing the right to speedy trial is not the sole responsibility of the courts. *See* United States v. Davis, 39 C.M.R. 170 (C.M.A. 1969) (holding that convening authority must conduct a new posttrial review when the staff judge advocate recommended that the convening authority merely defer to the appellate board of review to decide the speedy trial issue).

V. Renewing the Military Justice System's Attentiveness to Article 33

One set of "immediate steps" that historically has received little attention comprise the requirements expressed in UCMJ Article **33,** which states the following:

> When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

The principal purpose of this statute is "to insure an expeditious processing of charges and specifications in general court-martial trials."[136] Article **33** effectively requires the government either: (1) to prefer charges, prepare the charge sheet and allied papers, produce a report of investigation, and forward these documents to the general court-martial convening authority[137] within eight days after issuing an order putting the accused into arrest or confinement;[138] or (2) to report in writing to the general court-martial convening authority the reasons why preferring, investigating, and forwarding the charges within those eight days is impracticable.[139]

Article **33** applies only to cases in which the government is holding an accused for trial by general court-martial. When a service member is in pretrial arrest or confinement, however, and the pendency of a general court-martial is manifest—as in the case of an accused facing serious charges such as murder, rape, or robbery—Article **33** clearly requires the government to take certain

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[136] S. REP. No. ***486,*** 81st Cong., 2d Sess. 17 (1950), ***reprinted in*** 1950 U.S.C.C.A.N. 2240. The Court of Military Appeals also has found that Article 33 is inextricably related to a service member's right to counsel—based on notions of fundamental fairness-even for short periods of pretrial confinement. ***See*** United States v. Jackson, 5 M.J. 223,226 (C.M.A. 1978).

[137] ***See*** UCMJ art. 22 (1988) (prescribing who may convene a general court-martial). General court-martial convening authority typically vests with each service secretary and commanding officer in the chain of command from the President down to commanding general officers of two-star rank. Below that level, the President and service secretaries may designate additional commanding officer billets as general court-martial convening authorities. ***See also*** MCM, ***supra*** note 9, R.C.M. 504(b)(1) (defining who may convene general courts-martial).

[138] ***See generally*** MCM, *supra* note 9, R.C.M. 305(d) (prescribing conditions necessary for a commander to order a service member into pretrial confinement); ***id.*** R.C.M. 304(c) (prescribing conditions necessary for a commander to order a service member into pretrial restraint, including arrest).

[139] ***See*** S. REP. No. 486, 81st Cong., 2d Sess. 17 (1950), ***reprinted in*** 1950 U.S. Code Cong. Serv. 2240 ("the requirement that the report be in writing will help insure compliance with this article").

"immediate steps." Consequently, under certain circumstances, the interplay between Article **33** and the "immediate steps" requirement of Article 10 conceivably could warrant a dismissal based on a speedy trial violation before the expiration of the 120 days prescribed by R.C.M. 707(a).

The "immediate steps" mandate does not require the government to move continuously toward court-martial. The military courts, however, will require a trial counsel to exercise reasonable diligence in bringing charges to trial.[140] Furthermore, absent lawfully excludable delays, a court-martial must apply speedy trial rules strictly.[141] Because the Manual's 120-day rule is fairly mechanical, a court-martial can apply it with relative objectivity. Applying the "immediate steps" rule of UCMJ Article 10, on the other hand, usually requires a more subjective evaluation of whether or not the government has proceeded to trial with reasonable diligence.[142] A finding that the government has failed to exercise reasonable diligence, however, may depend on a variety of factors, any of which may be so outrageous that it could trigger a speedy trial violation. The pertinent issue, therefore, is whether the government's failure to take the steps required by Article **33** ever could be sufficient to demonstrate a lack of reasonable diligence analogous to a violation of the "immediate steps" mandate of Article 10, thereby warranting the dismissal of charges against an accused.

A. Article ***33 Case*** Law

The government's failure to satisfy the requirements of Article **33** should be a cognizable reason for vindicating a government violation of an individual's speedy trial protections in the same manner as a court must remedy violations of UCMJ Article 10, R.C.M. 707, and the Sixth Amendment—namely, moving for dismissal. Only a handful of cases, however, have addressed the meaning and significance of Article **33.**

In *United* States *v. Hounshell*,[143] the accused asserted that the government violated his rights to a speedy trial under the Sixth Amendment by holding him in pretrial confinement for over eleven months.[144] Although the Court of Military Appeals ultimately

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[140]*See* United States v. Demmer, 24 M.J. 731 (A.C.M.R.1987).

[141]*See* United States v. Givens, 30 M.J. 294, 298 (C.M.A. 1990) (requirements of original R.C.M. 707(e) are unequivocal); ***see*** *also* United States v. Carlisle, 25 M.J. 426,428 (C.M.A. 1988).

[142]*See* United States v. Parish, 38 C.M.R.209, 214 (C.M.A. 1968).

[143]21 C.M.R. 129 (C.M.A. 1956).

[144]*Id.* at 132.

declined to resolve the speedy trial issue purely on Article **33** grounds, it stressed that Article **33** was integral to Congress's scheme of "emphasi[zing] the importance" of according speedy trial rights to service members awaiting courts-martial.[145] The *Hounshell* court concluded that "speedy trial is a substantial right," and that a trial judge can redress a denial of that right by dismissing charges against the accused.[146]

In *United States v. Callahan,*[147] the government held the appellant in pretrial confinement for almost a month before preferring charges against him, and for over an additional month before the general court-martial convening authority referred the charges to a court-martial.[148] Unlike its decision in *Hounshell,* the Court of Military Appeals not only acknowledged that the government had violated Article **33,** but also considered the remedy required. The *Callahan* court noted that neither Article **33** itself nor any other provision in the UCMJ prescribed dismissal of charges as the remedy for violating Article **33.** Instead, the court stated that it would examine "'reasons'for the delay" to determine the effect of the violation.[149] Accordingly, finding that the government had proceeded with reasonable dispatch, and noting that the defense never specifically objected to the prosecution's failure to transmit an "eight-day letter,"[150] the court denied Callahan's motion to dismiss.

Scarcely six months had passed until Article **33** again became the focus of a speedy trial issue before the Court of Military Appeals. In *United States v. Brown*,[151] the accused was confined for two months before the convening authority received the charges and referred them to a court-martial. At a general court-martial convened 108 days after the government put the accused in pretrial confinement, Brown's defense counsel asserted that the government's delays violated UCMJ Articles 10 and **33,** deprived Brown of "a substantial right," and required dismissal of the charges.[152] The trial counsel responded by conceding that he could not explain the

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[145] *Id.*

[146] *Id.*

[147] 27 C.M.R. 230 (C.M.A. 1959).

[148] *Id.* at 231.

[149] *Id.*

[150] *Id.* Although the opinion did not expressly cite to waiver as a reason for dismissing the appellant's speedy trial claim, the defense clearly failed to assert a complete writ of error. Unless the individual challenges both a violation of the eight-day forwarding requirement and a violation of the "eight-day letter" requirement, the appellant effectively has waived the error. See *supra* notes 132-39 and accompanying text.

[151] 28 C.M.R. 498 (C.M.A. 1959).

[152] *Id.* at 68.

reasons for the substantial delay. Accordingly, the law officer acknowledged that the accused proffered sufficient evidence to raise a cognizable speedy trial issue and stated for the record, "The law officer wishes to state that, of course, he is in full agreement with the principles referenced in the Federal Constitution, and in the Uniform Code of Military Justice, pertaining to providing a prompt trial. . . ."[153] As comforting as this language may have been to the accused, the law officer nevertheless placed on Brown the burden of proving that the delay materially prejudiced his substantial rights.[154]

The Court of Military Appeals aptly pointed out that the law officer "demonstrated his misconception of the effects of Articles 10 and 33."[155] Amplifying on its language from *Hounshell*, that Congress implemented UCMJ Articles 10 and 33 as components of a statutory scheme to assure speedy trials in the military, the Court of Military Appeals asserted the following:

> From these provisions,[156] read in the light of the intent of Congress as ascertained from the views of the framers of the Code, set out in our opinion in United States v. Hounshell . . . it is clear that whenever it affirmatively appears that officials of the military services have not complied with the requirements of Articles 10 and 33, . . . and the accused challenges this delict by appropriate motion, then, *the prosecution is required to show the full circumstances of the delay.*[157]

Noting that dismissal of charges was not an automatic remedy when officials fail to comply with these statutes, the *Brown* court went on to imply that dismissal nonetheless would be appropriate if the government could not prove satisfactorily that it proceeded with "reasonable dispatch."[158] In Brown's case, however, the court declined to rule on the merits of the Article 33 issue. Instead, it remanded the case for additional proceedings, concluding that the law officer's improperly shifting the burden of proof from the gov-

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[153] *Id.*

[154] *Id.*

[155] *Id.* at 69.

[156] UCMJ arts. 10, 33 (1950) (current versions appear at UCMJ arts. 10, 33 (1988)).The court also noted that UCMJ Article 98 was a part of the congressional scheme. *Brown*, 28 C.M.R. at 69. Article 98 provides, *inter alia*, for criminal sanctions against any person subject to the UCMJ who is responsible for "unnecessary delay in the disposition of any case."UCMJ art. 98(1) (1988).

[157] *Brown*, 28 C.M.R. at 69 (emphasisadded).

[158] *Id.*

ernment to the accused effectively prevented that officer from correctly resolving Brown's speedy trial motion.[159]

Five years after Brown, Private Floyd McKenzie's assertion that, by failing to comply with Article **33,** the government denied him military due process, elicited the Court of Military Appeals's first formal admonition to the military justice community on the gravity of Article **33.** In United States *v. McKenzie*,[160] the government not only failed to forward charges to the general court-martial convening authority until the accused already had served seventy-nine days in pretrial confinement, but also failed to report the reasons for the delay to that oficer in writing.[161] While the court ultimately found neither prejudice to the substantial rights of the accused, nor a denial of due process, Judge Ferguson, speaking for the court, effectively cautioned all military practitioners against ignoring the edicts of Article **33.**

> [W]e emphasize the duty and responsibility of every officer to comply with the mandates of the Uniform Code. In the past, we fear, Article **33** has been observed more often in breach than in following its clear terms. In order to avoid future controversies in this area, we suggest that the attention of all concerned with the processing of court-martial matters be forcibly drawn to its unambiguous command.[162]

Although Judge Ferguson's comments in McKenzie certainly put judge advocates on notice of the unequivocal terms of Article **33,** the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) apparently found flexibility in the statute's language. In Burns *v. Harris,*[163] the Eighth Circuit considered the habeas corpus petition of a convicted service member. Burns asserted that the government violated UCMJ Article **33** by failing to take steps to try him on murder charges until he had been in pretrial confinement

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[159] *Id.* at 70.

[160] 34 C.M.R. 141 (C.M.A. 1964).

[161] *Id.* at **142.**

[162] *Id.* at 144. Judge Ferguson did not fashion this admonition in a judicial vacuum. The military has had a long-standing precedent to mandate its inflexible adherence to the language of congressional statutes. In United States v. Clay, 1 C.M.R. 74, 77-78 (C.M.A. 1951), the court noted the following:

> Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws enacted by Congress.

[163] 340 F.2d **383** (8th Cir. 1965) (per curiam).

for fourteen days. The court implicitly conceded that a technical violation of Article 33's eight-day rule had occurred. Nevertheless, it evidently was impressed by Article 33's adaptability to "the overriding considerations of military life," the relatively short duration in forwarding charges, and the government's ultimate success in completing Burns's court-martial within three month's of his arrest.[164] Accordingly, the court essentially held that, as long as the government eventually concludes its trial against an accused in an otherwise speedy manner — that is, without purposeful or oppressive delay — compliance with other UCMJ speedy trial provisions can vitiate an Article **33** violation. The Eighth Circuit, therefore, apparently found Article **33** to be tolerant of minor transgressions and quite forgiving to the government, notwithstanding the McKenzie court's language to the contrary.[165]

Although Judge Ferguson adhered to the principles that he had delineated in McKenzie, his brethren evidently were comfortable with the elastic approach to alleged Article **33** violations that the Eighth Circuit had taken in *Burns*. In United States *v. Tibbs*,[166] Chief Judge Quinn and Judge Kilday — both of whom concurred in *McKenzie*[167] — blatantly ignored Judge Ferguson's admonition. In Tibbs, the accused alleged that the government failed to comply with Article **33** by holding him in pretrial confinement for over one month before forwarding the charges to the general court-martial convening authority and by failing to report in writing the reasons for this delay.[168] Chief Judge Quinn's explanation of the facts in *Tibbs* revealed that the government unmistakably violated the unambiguous terms of Article **33.** Moreover, the trial counsel and the law officer presiding at Tibbs's court-martial acknowledged on the record that a technical violation of Article **33** actually had occurred. Remarkably, however, the Court of Military Appeals determined that, because "satisfactory reasons for the delay appear[ed] in the record of trial . . . [t]here [was], therefore, no indication of a violation of the requirements of Article **33** . . . ."[169]

Predictably and correctly, Judge Ferguson strenuously dissented to the majority's holding — a holding that essentially held that

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[164]*See* id. at **387.**

[165]*Compare* id. with McKenzie, **34** C.M.R. at **144.**

[166]35 C.M.R.**322** (C.M.A.1965).

[167]*See* McKenzie, **34** C.M.R. at **144.**

[168]*Id.* at **324.**

[169]*Id.* The Navy-Marine Corps Court of Military Review later confused the holding in *Tibbs* even more. Carefully read, the ultimate finding in *Tibbs* was that no violation of Article **33** had occurred. **See** id. In United States v. Wager, 10 M.J. **546, 554** (N.M.C.M.R.1980), however, the court incorrectly cited *Tibbs* for the proposition that "noncompliance with [the Article **33**] procedural mandate does not, of itself, require any corrective action."

the statute's "unambiguous command" for an "eight-day letter" was merely precatory. Judge Ferguson asserted that the court's "rationale betray[ed] an impatience with the commands laid down [in UCMJ Article 33] by Congress and implicitly suggest[ed] that no remedy was intended for their enforcement . . . ."[170] After he reiterated the importance of UCMJ's speedy trial provisions in general,[171] Judge Ferguson asserted that Article 33 was the "positive command" of Congress and, as such, compliance with its requirements was not a matter of degree.[172] Moreover, he reiterated the persistent indifference with which military officials violated the statute's manifest scriptures. The dissenting opinion then concluded by demanding that the armed forces comply with the law as passed by Congress, and by declaring the following:

> If we do not insist upon a consistent approach to this recurring problem of unexplained delay, then the Articles will become a dead letter and accused persons—denied the opportunity for bail—will continue to go without relief until such time as their commanders find it convenient to try them. I submit that Congress intended no such situation to exist under the Code, and I cannot be a party to allowing it once more to rear its medusan head.[173]

In 1969, the Court of Military Appeals rendered two opinions that addressed Article 33 issues: United States v. *Hawes*[174] and United States v. *Mladjen*.[175] Neither of these cases elucidated the court's expectations of military justice officials responsible for complying with Article 33. Nevertheless, both of them offered factual scenarios that provided the courts some latitude in interpreting the statute.

Hawes, for example, examined whether an accused's actions could be tantamount to a waiver of his or her statutory speedy trial rights under Article 33. In Hawes, the accused was in pretrial confinement for over two months, awaiting trial for an unauthorized absence. During this period, the government lost or misplaced the case file, delaying Hawes's case for thirty-five days. The court

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[170] *Id.* at 329 (Ferguson, J., dissenting).

[171] *Id.* at 329-32 (citing United States v. Schlack, 34 C.M.R. 151, 154 (C.M.A. 1964); United States v. McKenzie, 34 C.M.R. 141 (C.M.A. 1964); United States v. Brown, 28 C.M.R. 64, 69 (C.M.A. 1959); United States v. Hounshell, 21 C.M.R. 129, 132 (C.M.A. 1956); UCMJ arts. 10, 30(b), 33 (1964)).

[172] *Id.* at 332.

[173] *Id.* at 333.

[174] 40 C.M.R. 176 (C.M.A. 1969).

[175] 41 C.M.R. 159 (C.M.A. 1969).

acknowledged that "losing a case file is especially intolerable if it may result in unnecessary pretrial confinement of the accused."[176] It noted, however, that Hawes never really contemplated a defense to the charge against him. Furthermore, the court pointed out that Hawes implicitly had countenanced the delay—not only to afford his defense counsel time to negotiate a favorable plea agreement, but also to postpone his trial until after his unit deployed to Vietnam.[177] Concluding that the government's failure to comply with Article **33** did not prejudice the accused, the court determined that dismissal was not required.[178]

Because the *Hawes* court acknowledged that the government technically violated Article **33,** the absence of a dissenting opinion by Judge Ferguson is surprising. One explanation for Judge Ferguson's silence in *Hawes* may be that he believed that Hawes should be estopped from seeking relief for an Article **33** violation that apparently inured to his own benefit.

In *Mladjen,* the court considered Article 33's implicit demand on a commander to portend the ultimate disposition of a service member's case. Article **33** applies only to "a person held for trial by general court-martial" whose case file the general court-martial convening authority has yet to receive.[179] Accordingly, to determine if the statute's eight-day rules apply to a particular military detainee, a commander faces the dilemma of predicting to which level of court-martial the senior convening authorities in the chain of command ultimately will refer that person's case.

Military authorities apprehended Mladjen when he was absent without authority, and discovered that he was carrying a false identification card and a concealed weapon.[180] Surprisingly, Mladjen immediately attempted escape; not surprisingly, Mladjen's commander immediately put Mladjen in pretrial confinement upon his recapture.[181] Apparently anticipating a quick disposition to the case, the special court-martial convening authority promptly referred the charges against Mladjen to a special court-martial. Before trial, however, investigators uncovered evidence to support additional charges against the accused.[182] These allegations prompted the special court-martial convening authority to initiate a

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[176]*Hawes*, *40* C.M.R. at 177.

[177]*Id* at 178.

[178]*Id.* at 179.

[179]*See* UCMJ art. *33* (1988).

[180]United States v. Mladjen, 41 C.M.R. 159, 160 (C.M.A. 1969).

[181]*Id.* at 161.

[182]Id. The additional charges against Mladjen included larceny and wrongful sale of military property. *Id.*

formal pretrial investigation,[183] which later persuaded him to combine all of the charges and forward them to the general court-martial convening authority for disposition. Significantly, less than eight days after the investigating officer recommended that Mladjen actually was deserving of a general court-martial, the special court-martial convening authority adopted that recommendation and transmitted it to the general court-martial convening authority.[184]

The delays attendant to the additional investigation, rereferral, and trial preparation forced Mladjen to remain in pretrial confinement for almost six months.[185] Notwithstanding these delays, had the Article 33 "clock" started when an officer having the power to dispose of the charges received an investigating officer's recommendation to refer the charges by general court-martial, then the government complied with Article 33.[186] On the other hand, had the time commenced substantially earlier—such as on Mladjen's first day of pretrial confinement, or on the day the special court-martial convening authority learned of the additional allegations—then a technical violation of Article 33 occurred. The *Mladjen* court rejected the latter interpretation, holding that, because the case initially had been referred to a special court-martial, Article 33 did not apply to the first set of charges.[187]

Emerging from his silence in *Hawes*, Judge Ferguson concurred only in the result in *Mladjen*. In his concurring opinion, he acknowledged the difficulties in resolving speedy trial issues that arise from Article 33. Nevertheless, Judge Ferguson again lashed out at the military legal community, stating that, "in most instances, the issue is avoidable through the simple expedient of proper adherence by the Government to the specific provisions of Articles 10 and 33."[188] Moreover, he manifested his cynicism that the special court-martial convening authority only realized that a general court-martial was possible after receiving an Article 32 investigating officer's report. Convinced that military officials could not seriously entertain a mere special court-martial in the wake of the additional allegations against Mladjen, Judge Ferguson declared that the government's actions demonstrated an "utter lack

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[183] *See* UCMJ art. 32 (1988)(requiring a pretrial investigation of charges prior to their referral to a general court-martial).

[184] *Mladjen*, 41 C.M.R. at 162.

[185] *Id.* at 160-61.

[186] *See id.* at 162 (noting that the special court-martial convening authority complied with Article 33 by forwarding the report of investigation within eight days after determining that the charges required trial by general court-martial).

[187] *Id.*

[188] *Id.* at 162-63 (Ferguson, J., concurring in the result).

of regard for the spirit of the law and the intent of Congress when it considered [Article 33's] enactment."[189]

After Mladjen, the courts that heard complaints founded on Article 33 evidently were content to relegate their analyses to the footnotes of their opinions. In United States *v. Nelson,*[190] for example, the Court of Military Appeals easily disposed of a speedy trial claim by basing its ruling entirely on Article 10. Nevertheless, for no apparent reason, the court punctuated its speedy trial discussion with a footnote that acknowledged the relevance of Article 33 as a procedural mandate.[191]

Likewise, in United States *v. Rogers*,[192] the court considered an accused's Article 33 complaint, but only in a footnote to its opinion.[193] In Rogers, the government held the accused in pretrial confinement for **153** days, while he awaited a general court-martial on two charges of rape.[194] Rogers appealed his conviction, asserting inter alia that the government violated his speedy trial rights by failing to overcome the Burton presumption and by failing to comply with Article 33.195 The Court of Military Appeals disposed of the Burton issue by finding that less than ninety days of the 153-day delay were attributable to the government.[196] The court, however, implied that a technical violation of Article 33 had occurred. Nevertheless, it "rejected [Rogers's] complaint that his rights preserved under Article 33 . . . were violated," noting that the delay did not work to his prejudice and that the commander who forwarded the charges explained the delay in the transmittal letter accompanying the charges.[197]

The Navy-Marine Corps Court of Military Review also gave Article 33 passing attention in United States *v. Wholley*.[198] The Wholley court considered the case of a Marine whose special court-martial commenced eighty days after authorities first ordered him

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[189]*Id.* at 163 (Ferguson, J., concurring in the result) (citing United States v. Hounshell, 21 C.M.R. 129, 133-34 (C.M.A. 1956)).

[190]5 M.J. 189 (C.M.A. 1978).

[191]*Id.* at 190 n.1.

[192]United States v. Rogers, 7 M.J. 274 (C.M.A. 1979).

[193]*Id.* at 275 n.2.

[194]UCMJ art. 120 (1988).

[195]*Rogers*, 7 M.J. at 275 & nn. 1, 2.

[196]*Id.* at 275.

[197]*Id.* at 275 n.2 (citing United States **v.** Nelson, 5 M.J. 189, 190 n.1 (C.M.A. 1978)).

[198]13 M.J. 574 (N.M.C.M.R. 1982).

into pretrial confinement.[199] At the opening pretrial session, the accused moved to dismiss for a lack of speedy trial, asserting inter alia that the government failed to forward an "eight-day letter" in accordance with Article 33.[200] In a memorandum of decision on this motion, Judge Wholley made several specific findings that cited speedy trial violations, one of which was the government's failure to comply with Article 33. He concluded by ruling that, "under the totality of the circumstances . . . the government had not met its burden of showing it has proceeded in bringing these charges to trial with reasonable diligence."[201] Judge Wholley then sustained the motion and granted the remedy of dismissal.

Claiming that the judge abused his discretion, the government petitioned the Navy-Marine Corps Court of Military Review for extraordinary relief to reverse the order to dismiss. Notwithstanding its lengthy opinion, which exhaustively addresses each of Judge Wholley's specific findings, the court quickly found no merit in the accused's Article 33 objection. Essentially, the court determined that, because the accused's case had been referred to a special court-martial, Article 33 simply did not apply.[202] After examining the entire record, the court granted the government's petition.

The most recent case to give direct attention to Article 33 was United States *v. Honican.*[203] In Honican, the Army Court of Military Review determined that the weight of an Article **33** violation implicated the accused's Article 10 right to a speedy trial.[204] While in pretrial confinement, Private First Class Honican faced multiple allegations of desertion205 and forgery.[206] Despite substantial evi-

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[199]*Id.* at 577. The accused allegedly conspired to steal a .45 caliber pistol, aided in stealing it, and ultimately received it as stolen property. *Id.* at 575. He was in pretrial confinement for fifty-six days before receiving the benefit of an appointed defense counsel. On the 64th day of his confinement, Marine Corps authorities released the accused, and two days later, his counsel entered a written demand for speedy trial. Sixteen days later, the trial commenced. *Id.* at 575-77.

[200]*Id.* at 576-78. The accused apparently argued that the government's decision to hold an Article 32 investigation evidenced its intention to try the accused at a general court-martial. Accordingly, based on the objective standard urged by the dissent in *United States v. Mladjen,* the government should have complied with Article 33 regardless of the case's eventual disposition. *See* **41** C.M.R. 159, 162-63 (C.M.A. 1969) (Ferguson, J., dissenting); *see also supra* notes 180-89 and accompanying text.

[201]*Wholley*, 13 M.J. at 577.

[202]*Id.* at 580. The Navy-Marine Corps Court of Military Review added that, even if Article 33 had applied, "no prejudice accru[ed] to the accused. *Id.*

[203]27 M.J. 590 (A.C.M.R. 1988).

[204]*Id.* at 594.

[205]UCMJ art. 85 (1988).

[206]*Id.* art. 123.

dence against Honican on the forgery allegations,[207] the government chose to delay its prosecution of those charges while it awaited the arrival of a "largely superfluous"[208] laboratory analysis of fingerprint evidence. The government did not prefer the forgery charges until the seventy-seventh day of Honican's pretrial confinement. Moreover, on the very next day, it referred only the desertion charges to a special court-martial that assembled on the eighty-third day of Honican's pretrial detention—a court-martial that convicted Honican of two absences without leave (AWOL).[209] Finally, only after completing his incarceration of ninety-two days on the AWOL convictions did the government refer the forgery charges to a general court-martial which, on receiving Honican's pleas of guilty, sentenced him to a dishonorable discharge and three years of confinement.[210]

The Army Court of Military Review found that the government needlessly split the charges against Honican. Therefore, the court took the unusual step of counting all of the confinement for the first set of charges, both pretrial and posttrial, as pretrial confinement time for the second set of charges.[211] It also found that preferring, investigating, and forwarding the forgery charges for trial with the desertion charges was not "impracticable."[212] Accordingly, the Army Court of Military Review held that the government violated Article 10's mandate of a speedy trial in two ways. The government not only violated the *Burton* ninety-day rule by failing to bring Honican to trial until the ninety-second day of pretrial confinement, but also violated Article **33** by failing to process the forgery charges as expeditiously as practicable.[213]

Honican is significant because the court found that dismissal was warranted, at least in part, based on an Article **33** violation. Nevertheless, the case fails to settle the state of confusion in applying Article **33** as a speedy trial rule. Because the government clearly failed to complete the forwarding of general court-martial charges against the accused within the eight-day limit, and because nothing in the record indicated the existence of an "eight-day letter" to explain the reasons for the delay, the *Honican* court was correct in

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[207] *Honican*, 27 M.J. at 592.

[208] *Id.* at 593.

[209] UCMJ art. 86 (1988).

[210] *Honican*, 27 M.J. at 591. Pursuant to a pretrial agreement, the convening authority suspended for 180 days the length of confinement that exceeded a period of two years. *Id.*

[211] *Id.* at 592-94.

[212] *Id.* at 593.

[213] *Id.* at 594.

noting that an Article **33** violation had occurred. The court also was correct in pointing out that the Article **33** violation demonstrated the government's "apparent disregard for statutorily-prescribed procedure."[214]

Unfortunately, two aspects of the decision detract from *Honican's* conclusiveness as Article **33** case law. First, the Article **33** violation depends solely on the court's ruling that all of the net confinement time that Honican served on the initial set of charges also counted as pretrial confinement on the later set. Without this ruling, Honican never actually was "held [in pretrial arrest or confinement] for trial by general court-martial."[215] Likewise, because the government tried Honican on the first set of charges—the charges for which he was held in pretrial confinement—by special court-martial, *Wholley* and *Mladjen* nevertheless would have made any Article **33** objection moot.[216] Accordingly, the finding of an Article **33** violation in *Honican* fairly relies on the court's decision to manipulate the categorization of confinement periods.

The second aspect of the *Honican* opinion that diminishes its comprehensiveness is that, in ruling to dismiss the charges against the accused, the court relied predominantly on several factors, other than the government's failure to comply with Article **33,** to find that an Article 10 speedy trial violation had occurred. Moreover, the court declined to give any intimation as to the relative weight a court should give to an Article **33** violation in resolving a speedy trial issue. Consequently, even after the *Honican* court gave Article **33** unprecedented attention, military trial practitioners still have no definitive guidance on the implications of violating the statute's eight-day rules.

B. Article 33 Commentary

In practice, the case in which the charges and a report of investigation actually reach the general court-martial convening authority within eight days is rare. Accordingly, many military practitioners apparently have become inured to viewing the mandate of Article **33** as an "anachronism."[217] Some commentators actu-

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[214] *Id.* at 593.

[215] UCMJ art. 33 (1988).

[216] *See* United States v. Mladjen, **41** C.M.R. 159, 162 (C.M.A. 1969) (holding that government has no Article 33 duties until it actually intends to proceed against an accused at a general court-martial); United States v. Wholley, 13 M.J. 574, 580 (C.M.A. 1982) (holding that government's ultimate decision to try an accused a special court-martial will neutralize Article 33 objections, even if it may have intended earlier to proceed to a general court-martial); ***see also*** *supra* notes 180-89, 198-202 and accompanying text.

[217] *See* DA PAM. 27-173, *supra* note 85, para. 15-2a, at 93.

ally countenance this interpretation because "the procedural requirements attendant to processing and forwarding charges make the requirement[s of Article 33] difficult to meet."[218] The view of these commentators, however, dangerously misconstrues not only the general mandate of laws that apply to the military, but also the specific mandates of Article **33.**

First, the general mandate of laws that apply to the military is manifest — that is, the *Manual for Courts-Martial* and the service regulations that pertain to the military justice system must implement and facilitate the statutory requirements that the UCMJ imposes on the armed forces. Conversely, any regulatory requirement promulgated in the *Manual* or contained in a service regulation is legally deficient if its application habitually prevents the implementation of a statute or patently frustrates a statute's purpose. An otherwise valid law, therefore, manifestly cannot endure the persistent indifference of the officials charged with implementing it, especially when the reason for the indifference is the officials' assertions that ***they*** have created an administrative structure that effectively renders the law an anachronism.

Paradoxically, the *Manual* and the service regulations that implement the UCMJ have created the procedural requirements that now supposedly make Article **33** compliance difficult. If meeting the requirements of Article **33** is almost always impossible, and if Congress does not act to repeal or amend Article **33,** the military's mandate should be clear. It must eliminate the "procedural requirements attendant to processing and forwarding charges" that frustrate the unequivocal mandate of Article **33,** and it must adopt procedures that assure Article **33** compliance. Dismissing a valid federal statute as an "anachronism" simply is an unacceptable retort — and, in practice, an illegal response — to an otherwise valid law.

The second problem with the view of Article **33** shared by these commentators is that it addresses only the article's fundamental requirement — that is, forwarding charges within eight days.[219] Even though this basic requirement is not "inflexibly mandatory or self-executing,"[220] the article itself explicitly defines the sole cure for violating this basic requirement — namely, forwarding an "eight-day letter" instead. The unambiguous, rigid, and exclusive character

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[218] *Id.*

[219] UCMJ art. 33 (1988).

[220] *See* Burns **v.** Harris, **340** F.2d **383** (8th Cir. 1965) **(per** curiam).

of this intrinsic exception, therefore, creates a unitary statutory framework that is, in reality, inflexibly mandatory and self-executing.[221]

Furthermore, analyzing the actions necessary to comply with Article **33,** in theory, is remarkably elementary. A functional analysis of the article yields only two possible outcomes: **(1)** if complying with the statute's basic requirement is practicable, then the only way the government can comply with Article **33** is to ensure that the accused's commanding officer forwards the charges and allied papers to the general court-martial convening authority within eight days; or (2) if complying with the statute's basic requirement is not practicable, then the only way the government can comply with Article **33** is to explain the reasons for the impracticability by forwarding an "eight-day letter" instead.

This analysis clarifies that many commentators—and certainly the drafters of the opinion in *United States v. Tibbs*[222]—have been incorrect in asserting that impracticability alone will vitiate an Article **33** violation. To the contrary, if complying with Article 33's basic requirement of forwarding charges within eight days truly is impracticable under the facts of a particular case, the government still can assure compliance with Article **33** by forwarding an "eight-day letter" to the convening authority. Nothing in statute implies that the government also can be excused—by averring impracticability or by advancing any other justification—from Article 33's intrinsic "eight-day letter" requirement. Consequently, although the language of Article **33** itself acknowledges that satisfying its basic requirement will not always be possible, satisfying the statute's overall mandate—a mandate that embodies a single exception to accommodate military exigencies[223]—*always* must be practicable.

Because complying with the mandates of Article **33** is and always has been practicable, dismissing it as an anachronism is a peculiar method of excusing the government for violating it. On the contrary, as an adjunct to the speedy trial enforcement framework contained in the UCMJ, Article 33's intended purpose is as valid

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[221] *Cf. id.* at 387. The Eighth Circuit's analysis in Burns—an analysis that heralds Article 33's flexibility—is distorted. The Eighth Circuit's assertion that "[Article 33] contains an exception, or area of discretion, in its twice appearing 'if practicable' language" is not an accurate description of Article 33's framework. The Eighth Circuit's language implies that the statute has two independent exception clauses. In other words, it implies that the statute says, "Do *X* if practicable; if not, do *Y* if practicable." A more accurate characterization of the statute's exception, however, would have stated, "Do *X* if practicable; if not, do *Y.*"

[222] 35 C.M.R. 322 (C.M.A. 1965).

[223] *See Burns,* 340 F.2d at 387 (noting that Congress incorporated the "if practicable" language of Article 33 to adapt the statute's mandate to "the overriding considerations of military life . . .").

now as it was when Congress passed it in 1950. As the statute's legislative history points out, "[tlhis article is . . . intended to insure expeditious processing of charges and specifications in general court-martial trials. *The requirement that the report be made in writing will help insure compliance with this article.*"[224] Commentators who argue that Article **33** is incongruous to contemporary court-martial practice effectively ignore Congress's incorporation of the statute's enduring purpose. Specifically, if the evolution of court-martial practice over the past forty years has had any effect on Article **33,** it has not made it an anachronism. Rather, the practical difficulties that often lead to the government's inability to comply with the basic eight-day forwarding requirement simply should force the government regularly to satisfy the statute's mandate by using the "eight-day letter."

Consequently, the protections that Article **33** affords to service members in pretrial confinement is not merely conceptual, but is real. In particular, the statute is a crucial part of a military detainee's right to a "speedier" trial. Accordingly, Article **33** clearly is an important component of Congress's intended speedy trial scheme that deserves the military justice system's renewed attentiveness.

VI. Applying the Federal Speedy Trial Act to Courts-Martial

Courts and commentators generally agree that the FSTA[225] does not apply to courts-martial.[226] A close reading of the statute, however, reveals that Congress failed to make a comprehensive exception that totally excluded the military justice system from the FSTA's reach. Specifically, the purported court-martial exception, which actually is a court-martial *offense* exclusion, states the following:

> As used in this chapter— . . . the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than . . . an offense triable by

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[224] S. REP. NO. 486, 81st Cong., 2d Sess. 17 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2240 (emphasis added).

[225] 18 U.S.C. §§ 3161-3174 (1988).

[226] *See* United States *v.* Aragon, 1 M.J. 662, 667-68 (N.M.C.M.R. 19751; SCHLUETER, *supra* note 91, § 13-3(C), at 436 ("The Federal Speedy Trial Act is not applicable to courts-martial") (footnotes omitted); DA PAM. 27-173, *supra* note 85, para. 15-1b, at 92 n.10 (although R.C.M. 707 is based loosely on the FSTA, "the act itself specifically excludes trials by court-martial"); *cf.* United States v. Greer, 21 M.J. 338, 340-41 (C.M.A. 1986) (time limitations contained in Interstate Agreement on Detainers are applicable to the military); 18 U.S.C. app. 2, § 2 (1988).

> court-martial, military commission, provost court, or any other military tribunal).[227]

Those who interpret this provision to mean that the FSTA's protections do not extend to courts-martial apparently believe that the statute's inapplicability to military offenses implies that the statute is equally inapplicable to military detainees. On the other hand, a strict interpretation of this provision would mean that any protection afforded by the FSTA that does not depend on the characterization of the underlying criminal offense should apply to the military.

Significantly, while the sections of the FSTA that set objective time limits on the processing of charges for all criminal cases specifically refer to covered criminal "offenses," the section that accords priority to cases in which the subject is confined awaiting trial does not. That section states that, "the trial or other disposition of cases involving— . . . a detained person who is being held in detention solely because he is awaiting trial . . . shall be accorded priority."[228] Taken out of context, this section clearly is immune from the court-martial offense exception. Nevertheless, because the congressional intent in passing the FSTA not only was to promote speed in punishing criminal offenses, but also was to protect the speedy trial rights of individuals,[229] nothing indicates that Congress did not want section 3164's "detained person priority rule" to apply to all individuals, regardless of the characterization of the offense charged. That the remedy for a section 3164 violation is release from custody, rather than dismissal of the offense,[230] supports this notion. Accordingly, ample compelling reasons support a strict interpretation of the court-martial offense exception, and the application of the FSTA's detained person priority rule to incarcerated service members awaiting courts-martial.

VII. Revising Rule for Courts-Martial707

Since it rendered its 1972 decision in United States v. *Burton,*[231] the Court of Military Appeals and the President have

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[227] 18 U.S.C. § 3172(2) (1988).

[228] *Id.* § 3164(a)(1).

[229] *See* United States v. Krohn, 558 F.2d 390 (8th Cir.), cert. denied, 434 U.S. 868 (1977); *cf.* United States v. Bullock, 551 F.2d 1377 (5th Cir. 1977).

[230] *See* United States v. Diaz-Alvarado, 587 F.2d 1002 (9th Cir. 1978), *cert.* denied, 440 U.S. 927 (1979) (holding that sole remedy for 18 U.S.C. § 3164 violation is release from custody); United States v. Gandara, 586 F.2d 1156 (7th Cir. 1978) (same); United States v. Gaines, 563 F.2d 1352 (9th Cir. 1977) (same); United States v. Krohn, 560 F.2d 293 (7th Cir.) (same), cert. denied, 434 U.S. 895 (1977).

[231] 44 C.M.R. 166 (C.M.A. 1971).

dueled over the military's speedy trial procedures. First, convinced that UCMJ Article 10 required an effective enforcement mechanism, the court formulated the *Burton* ninety-day rule.[232] Next, the drafters of the 1984 version of the *Manual*, answering the court's call for an objective standard and hoping to ameliorate what it perceived to be a harsh rule,[233] formulated a regulatory ninety-day rule with the intent of supplanting the *Burton* ninety-day rule.[234] The Court of Military Appeals responded in *United States v. Harvey*,[235] finding that R.C.M. 707(d) manifested no "Presidential intent to overrule *Burton*" and expressing doubt about the President's authority to displace the court's interpretation of Article 10.[236] The *Harvey* opinion, therefore, intimated that the President's initial attempt to protect a detained accused's speedy trial rights by executive order was inadequate.

Curiously, the *Manual's* drafters responded, not by strengthening the protections that R.C.M. 707 afforded to pretrial detainees, but by eliminating these protections altogether. As if to concede that the *Burton* ninety-day rule transcended any attempt by the drafters to formulate a superseding regulatory mechanism to enforce Article 10, in 1991 the President not only eliminated the *Manual*'s ninety-day release and "immediate steps" rules, but also eliminated dis-

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[232] *Id.* at 172.

[233] *See* Chris G. Wittmayer, *Rule for Courts-Martial 707: The 1984 Manual for Courts-Martial Speedy Trial Rule*, 116 MIL. L. REV. 221, 259 (1987) ("R.C.M. 707 and 707(d) are, in part, a response to a perception that the *Burton* rules have been applied too harshly against the Government"). ***See*** *generally* Note, *Military Court System* ***Takes*** *the Initiative with the Issue of Speedy Dial*, 3 CAPITAL U.L. REV. 292 (1974).

[234] *See* MCM, *supra* note 9, R.C.M. 707(d) analysis, app. 21, at A21-38 (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)). The drafters of R.C.M. 707 unquestionably wanted the Court of Military Appeals to overrule the *Burton* decision. *Id.* ("Subsection (d), together with the speedy trial requirements of this rule provides a basis for further reexamination of the *Burton* presumption.").

[235] 23 M.J. 280 (C.M.A. 1986) (memorandum opinion); ***see*** *also* United States v. Alexander, 26 M.J. 587, 588 (A.C.M.R. 1988) (acknowledging that *Burton* ninety-day rule is "alive and well").

[236] *Id.* The Court of Military Appeals since has clarified the ambiguity that its decision in *Harvey* created. "[T]he President cannot overrule or diminish [the court's] interpretation of a statute." United States **v.** Kossman, 38 M.J. 258, 260-61 (C.M.A. 1993) (footnote omitted). Curiously, the footnote to this passage from the *Kossman* opinion states that, in *Burton*, the court was "not purporting to interpret Article 10. but to enforce it." *Id.* at 261 n.2. This assertion epitomizes the apparent dialectic between the Court of Military Appeals and the President over the speedy trial issue. Clearly, the prerogative and the responsibility to enforce a statute — that is, to "take Care that the Laws be faithfully executed" — vests with the President as an express executive power. ***See*** U.S. CONST. art. 11, sec. 3. Accordingly, the *Kossman* court evidently stepped back from its challenge to presidential authority in *Haruey*. While "the President [may not be able to] overrule or diminish [the court's] interpretation of a statute," the President certainly should be able to overrule or diminish the court's mechanism for enforcing a statute.

missal with prejudice as the sole remedy for regulatory speedy trial violations.[237] Paradoxically, this latest change—a change that affords no additional speedy trial protections to an accused in pretrial confinement over his or her counterpart at liberty—was sufficient to convince the Court of Military Appeals that the President's comprehensive speedy trial scheme now is adequate to enforce UCMJ Article 10.[238]

Although nothing in the analysis to the present R.C.M. 707 explicitly states that the President yielded to the court in this duel over speedy trial procedures, several nuances imply that the drafters meant to do just that. First, a principal reason for making the latest change to R.C.M. 707 was to simplify speedy trial proce-

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[237] *See* MCM, *supra* note 9, R.C.M. 707 (C5, 15 Nov. 1991); *id.* R.C.M. 707(d) (allowing trial judge to dismiss charges affected by speedy trial rule violations either with or without prejudice). Permitting a judge who finds a speedy trial violation to dismiss without prejudice is a radical departure from the prior version of R.C.M. 707. The drafters' analysis merely states that the rule is based on the FSTA, which permits dismissal without prejudice. *See id.* R.C.M. *707* analysis, at 9; 18 U.S.C. § 3162 (1988). Apparently, without acknowledging the distinctions between federal-civilian and military criminal practices, the drafters decided to adopt the FSTA's rule summarily. Prior to this change, however, the drafters emphasized this distinction in the following passage:

> [The Federal Speedy Trial Act] provides dismissal as a sanction for speedy trial violations, but permits the judge to dismiss with or without prejudice. The ***ABA** Standards* . . . point out that dismissal without prejudice is largely meaningless and especially inapposite as a sanction for speedy trial violations. Dismissal without prejudice merely creates additional delay in disposing of a case already found to have been delayed unreasonably. *Such a remedy is particularly inappropriate in courts-martial.* MCM, *supra* note 9, R.C.M. 707(e) analysis, app. 21, at A21-38 (emphasis added) (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991); *See* 18 U.S.C. § 3162 (1988). In addition, unlike the current drafters' analysis to R.C.M. 707, the original analysis stressed that the military speedy trial rule is "generally similar to [the FSTA, but] differs from [it] in terms of specific requirements *because of the different procedures in courts-martial and because of the different conditions in the military.*" MCM, *supra* note 9, R.C.M. 707 analysis, app. 21, at A21-37 (emphasis added) (C3, 1 June 1987) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)).

[238] *See Kossman,* 38 M.J. at 262. One commentator made the following observation about the original version of R.C.M. 707, which contained the 90-day release rule and the "immediate steps" rule, and made dismissal with prejudice as the sole remedy for speedy trial violations:

> The *Burton* ninety day rule . . . arose from a need perceived by the Court of Military Appeals in 1971 for clearer guidance to insure more timely prosecution of courts-martial. The policy choices made by the President in R.C.M. 707 respond to the same perceived need for specified time limits. With R.C.M. 707 now the law, supplemented by the protection of the sixth amendment, little need remains for the *Burton* rules. . . . [O]ne would hope that the court will find that R.C.M. 707 supplants the *Burton* rules.

dures.[239] Accordingly, if the drafters recognized that two ninety-day rules merely complicated speedy trial issues, and if they resigned to the court's apparent unwillingness to withdraw the *Burton* rule, the President's decision to eliminate the R.C.M. 707(d) ninety-day rule was quite rational.[240] The drafters' change in tone on the *Burton* rule supports this reasoning. In particular, while the former R.C.M. 707 analysis tacitly challenged the Court of Milit: ry Appeals to reexamine *Burton,* the drafters eliminated this provocative language in the present analysis.[241] Accordingly, that Change 5 to the *Manual* defers to *Burton,* rather than challenges it, is a plausible theory. Moreover, accepting this conclusion means that, even though some continued to hope that the court would overrule *Burton,* many undoubtedly held the view that the latest changes to R.C.M. 707 made the *Burton* ninety-day rule more important now than ever.[242]

Kossman, therefore, should not end the President's dialectic with the Court of Military Appeals over enforcing the speedy trial rights of service members in pretrial detention. Rather, the President should respond to the court's decision to abandon the

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Wittmayer, *supra* note 233, at 263-64. That commentator's hopes finally were answered in *Kossman.* Nevertheless, one must wonder why the Court of Military Appeals determined that the original R.C.M. 707(d)—a rule which virtually mimicked *Burton*—*was* not sufficient to displace *Burton* in 1984, while the present R.C.M. 707—a much more lenient rule than *Burton*—*was* sufficient to displace *Burton* in 1993.

[239]*See* MCM, *supra* note 9, R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991) ("The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable.").

[240]*Cf.* 1 *Kings* 3:16-28. As if to abide by the judgment of King Solomon, the drafters deferred to the Court of Military Appeals and its *Burton* ninety-day rule, rather than perpetuate confusion over speedy trial law by dividing the responsibility for enforcing Article 10 between the President and the judiciary.

[241]*Compare* MCM, *supra* note 9, R.C.M. 707(d) analysis, app. 21, at A21-38 (C3, 1 June 1987) ("Subsection (d), together with the speedy trial requirements of this rule provides a basis for further reexamination of the *Burton* presumption") ***with id.*** R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991). The old and new analyses share the language, "Unless *Burton* and its progeny are reexamined, it would be possible to have a *Burton* violation despite compliance with this subsection." *Id.* R.C.M. 707(d) analysis, app. 21, at A21-38 (C3, 1 June 1987) (cross-reference omitted) (current version is R.C.M. 707 analysis (C5, 15 Nov. 1991)); ***id.*** R.C.M. 707 analysis, at 9 (C5, 15 Nov. 1991) (substituting the word "rule" for the word "subsection"). This passage, however, serves only as an admonition to trial practitioners.

[242]*See Kossman,* 38 M.J. at 267 (Wiss, J. dissenting) ("I have serious misgivings about the capacity of [the present R.C.M. 707] to fill the void caused by overruling *Burton*"); *cf.* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 17-20.00, at 625 (1991) ("at present *Burton* is the ultimate judicial protection of the statutory military right to a speedy trial"); ***id.*** § 17-57.00, at 654-55 ("one would predict . . . renewed emphasis on the *[Burton]* ninety day rule"). In addition to his "misgivings," Judge Wiss expressed concern that there is an "unexceptionally weakening trend in the fundamental, underpinning elements of" R.C.M. 707 and that, by eliminating the *Burton* rule in the wake of this trend, the *Kossman* majority has "reduc[ed] . . . any real chance for compliance with Article 10." *Kossman,* 38 M.J. at 267, 268 (Wiss, J. dissenting).

Burton rule by reinstituting a regulatory ninety-day rule and by amending certain provisions of R.C.M. 707 so that they reinforce the incarcerated service member's right to a "speedier" trial. These changes need not "reinvent the speedy-trial clock, second by second."[243] They need only repair the mechanisms necessary to sound the clock's alarm.

A. Resurrecting the R.C.M. 707 Ninety-Day Rule

The former R.C.M. 707(d) ninety-day rule required the government to release a service member whom it detained in pretrial confinement for ninety days.[244] This rule was entirely consistent with the FSTA, which requires the government to try or release incarcerated defendants within ninety days of arrest or confinement.[245] Moreover, like the FSTA,[246] a violation of the R.C.M. 707(d) ninety-day rule did not require dismissal; it required only the immediate release of the service member in custody.[247] Accordingly, consistent with federal criminal practice,[248] the old R.C.M. 707(d) protected the liberty interests of service members in pretrial detention, and encouraged the government to process its cases with exceptional diligence. The present version of R.C.M. 707, however, affords no such enhanced protection.[249]

Consequently, even though the drafters' analysis asserts that the remedies provided in the current R.C.M. 707 are consistent with

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[243] *Kossman*, 38 M.J. at 262 (Sullivan, C.J., dissenting).

[244] *See* MCM, ***supra*** note 9, R.C.M. 707(d) (C3, 1 June 1987) (current version is R.C.M. 707 (C5, 15 Nov. 1991)).

[245] *See* 18 U.S.C. § 3164(a), (b) (1988) ("The trial of ['a detained person who is being held in detention solely because he or she is awaiting trial'] shall commence not later than ninety days following the beginning of such continuous detention"); ***id.*** § 3164(c) ("No detainee . . . shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of trial.").

[246] *Id.* § 3164(c).

[247] *See* ***supra*** note 86 and accompanying text; *cf.* United States v. Diaz-Alverado, 587 F.2d 1002 (9th Cir. 1978), ***cert. denied,*** 440 U.S. 927 (1979) (sole remedy at the expiration of 90-day time period in 18 U.S.C. § 3164 is release from custody); United States v. Krohn, 560 F.2d 293 (7th Cir.), ***cert. denied,*** 434 U.S. 895 (1977) (same); United States v. Carpenter, 542 F.2d 1132 (9th Cir. 1976) (same); United States v. Tirasso, 532 F.2d 1288 (6th Cir. 1976) (18 U.S.C. § 3164 authorizes no less than an unconditional release from custody at the expiration of 90 consecutive days of pretrial confinement).

[248] *Cf.* UCMJ art. 36(b) (1988) (presidential regulations that enforce the UCMJ should be, "so far as he considers practicable," consistent with the laws applied in federal criminal cases).

[249] *See* MCM, ***supra*** note 9, R.C.M. 707 (C5, 15 Nov. 1991). The analysis to the new R.C.M. 707 fails to offer an explicit justification for abandoning the 90-day release rule. ***See*** id. R.C.M. 707 analysis, at 9. Actually, the drafters of the analysis to the new rule appear to have been deliberately subtle in making the change. The adornment that R.C.M. 707(d) "is based on ***[inter*** alia] 18 U.S.C. § 3164," which appeared in the original analysis to the rule, has vanished. ***Compare id.*** R.C.M. 707

one section of the FSTA,[250] the rule actually ignores the important ninety-day release mechanism that is an integral part of *Congress's* federal speedy trial scheme. More importantly, without this mechanism, the *President's* "comprehensive speedy trial scheme" does not appear to be so "comprehensive."[251] The President, therefore, should reinstitute a ninety-day release rule modeled after section **3164** of the FSTA.

B. Removing the Article 32 Officer's Authority to Grant Continuances

The discussion to the present R.C.M. 707(c)(1) states, "Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer."[252] Although this passage is not legally binding,[253] R.C.M. 707(c)(1) gives the service secretaries the authority to prescribe regulations that could systematize such delegations. Delegating the authority to grant prereferral continuances in the cases of detained service members, however, effectively circumvents much of Congress's intent in passing UCMJ Article 33.

The second prong of Article 33 imposes a reporting requirement on the commander of certain service members who have served more than eight days in confinement.[254] Congress intended the statute as a means of expediting the charges in general courts-martial, and intended the reporting requirement as a method of enforcing compliance with the statute.[255] The drafters of Article 33, however, also were concerned about ensuring that an officer having general court-martial convening authority would know when a service member, for whom that officer may have to convene a court-martial, was in pretrial confinement awaiting investigation.[256]

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analysis, app. 21, at A21-38 (C3, 1 June 1987) *with id.* R.C.M. 707(d) analysis, at 9 (C5, 15 Nov. 1991).

[250] *See id.* R.C.M. 707(d) analysis, at 9 (C5, 15 Nov. 1991) ("(d) *Remedy* This subsection is based on *The Federal Speedy Dial Act, 18* U.S.C. § 3162"). The cited section of the FSTA provides for dismissal—with or without prejudice—as the remedy for FSTA violations, but provides no protections to guarantee the liberty rights of defendants in pretrial detention. *See* 18 U.S.C. § 3162 (1988).

[251] *Cf.* United States v. Kossman, 38 M.J. **258,** 258 (C.M.A. 1993).

[252] MCM, *supra* note 9, R.C.M. 707(c)(1) discussion, at 7 (C5, 15 Nov. 1991); *see* UCMJ art. 32 (1988).

[253] *See supra* note 121 (*Manual* discussions are not legally binding).

[254] *See supra* notes 135-38 and accompanying text.

[255] *See* S. REP. NO. 486, 81st Cong., 1st Sess. 17 (1949); H.R. REP. No. 491, 81st Cong., 1st Sess. 20 (1949).

[256] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 908 (1949).

Finally, implicit in Article **33** is a statutory guarantee to an incarcerated accused that the general court-martial convening authority having jurisdiction over his or her case personally will consider the reasons for a delay in forwarding the charges.[257] In practice, therefore, continuances granted by Article **32** investigating officers, which otherwise would appear valid under the present R.C.M. 707(c)(1), often will violate the spirit, if not the letter, of Article 33.[258]

Accordingly, the President must amend R.C.M. 707 so that the rule comports with, and promotes the interests of, Article **33.** Even the former R.C.M. 707(c)(5), which allowed for the exclusion of periods attributable to delays in the Article **32** investigation, required the government to " 'invoke the relevant mechanism' by requesting and being granted a delay or a continuance."[259] Nevertheless, because it applied regardless of whether or not the accused was in pretrial confinement, this provision was broader than necessary. Accordingly, the President need only amend R.C.M. 707(c)(1) to clarify that, prior to referral in any case, the general court-martial convening authority personally must approve in writing any delays beyond the eighth day after an accused has been ordered into arrest or confinement.[260] The addition of this language would be a necessary and sufficient means of protecting the Article **33** interests that the present R.C.M. 707 speedy trial rule fails to accommodate. Moreover, because few unit commanders would rather solicit a written approval from a division commander than do what is necessary to ensure that a service member's case proceeds to trial with due diligence, the proposed amendment would serve as a functional adjunct to the speedy trial guarantees that Article **33** seeks to promote.

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[257]*See* Tichenor, ***supra*** note **87,** at 29.

[258]*Cf.* United States v. Weisenmuller, **38** C.M.R. **434, 438** (C.M.A. 1968). In *Weisenmuller,* the Court of Military Appeals emphasized the importance of complying with Article **33** by "explain[ing] on the record the reasons for otherwise untoward delay while the accused languishes in ***durance vile***." *Id.* More importantly, ***Weisenrnuller*** accentuated the relationship between personally informing the convening authority of the reasons for delay and the right to speedy trial in the military. Complying with this statutory requirement "would . . . insure that each man would receive the speedy, fair disposition of his case to which he is entitled under the Uniform Code." *Id.*

[259]*See* Wittmayer, ***supra*** note **233,** at **246** (citing United States v. Kuelker, 20 M.J. **715, 717** (N.M.C.M.R. 1985)).

[260]*Cf.* Tichenor, ***supra*** note **87,** at **30** (proposing that, for the purposes of Article **33** compliance, commanders and investigating officers routinely should treat a pretrial detainee as if he or she is awaiting trial by general court-martial). The proposed rule also would compel commanders to keep their chains of command apprised of the status of their service members in pretrial confinement. ***See id.*** at **31.** Furthermore, the requirement for approval in writing not only complements Article **33's** requirement for an "eight-day letter," but also preserves the record for judicial review should a speedy trial issue arise.

C. Amending the Factors That a Court Must Consider in Making Its Decision to Dismiss with or Without Prejudice

The present version of R.C.M. 707 allows a military judge to dismiss the charges affected by a speedy trial violation either "with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date."[261] The rule directs a court-martial to consider four factors in determining whether to dismiss with or without prejudice: (1) the seriousness of the offense charged; **(2)** the reasons for the delays that led to a speedy trial violation; **(3)** the impact that reinstitution of the charges will have on the administration of justice; and (4) the prejudice that the accused suffered because the government denied him or her a speedy trial.[262] The first three factors clearly are consistent with the three elements expressed in the FSTA's dismissal rule.[263] The fourth R.C.M. 707(d) factor comports with the Supreme Court's interpretation that Congress meant for judges to consider prejudice in applying the FSTA dismissal rule.[264] Nevertheless, while R.C.M. 707(d) certainly is true to the *federal* speedy trial statute, the real issue is whether it is true to Article 10—that is, the *military's* speedy trial statute.

Unfortunately, in *Kossman*, the Court of Military Appeals permitted the "tail to wag the dog" on precisely this issue. Addressing the remedy of dismissal, the *Kossman* court made the following conclusion:

> The remedy for an Article 10 violation must remain dismissal with prejudice of the affected charges. If it is concluded that the circumstances of delay are sufficiently excusable or avoidable as to permit a reinstitution of the charges, there is no violation of Article 10 in the first place. Where the circumstances of delay are not excusable, on the other hand, it is no remedy to compound the delay by starting all over.[265]

The meaning of this passage is unmistakable. If, after considering

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[261] MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991). The court must redress a denial of the accused's constitutional right to a speedy trial by dismissing the affected charges with prejudice. *Id.*; ***see*** Strunck v. United States, 412 U.S. 434 (1973) (dismissal of charges is the only appropriate remedy for violating a defendant's Sixth Amendment right to a speedy trial).

[262] MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991).

[263] *Compare id. with* 18 U.S.C. § 3162 (1988).

[264] *See* United States v. Taylor, 487 U.S. 326 (1988); ***see*** *also* United States v. Edmond, 41 M.J. 419, 421-22 (1995) (finding no abuse of trial judge's discretion in dismissing charges without prejudice; charges were pending for 176 days and accused was not under pretrial restraint).

[265] United States **v.** Kossman, 38 M.J. 258, 262 (C.M.A. 1993).

all four R.C.M. 707(d) factors, the court determines that the government may reprosecute the accused, even though it already has denied the service member the right to a speedy trial, no Article 10 violation could have occurred. Unfortunately, the court's reasoning is problematic.

The *Kossman* court exercised reverse logic by implying that, absent an abuse of discretion, the nature of a speedy trial remedy will determine the characterization of a speedy trial violation. This logic is faulty for two reasons. The first flaw is that it ignores the overreaching of the remedial scheme that appears in the present R.C.M. 707(d). In particular, the present R.C.M. 707(d), unlike the remedial provision in the former R.C.M. 707, attempts to prescribe the remedy for *all* speedy trial violations, not just violations of R.C.M. 707 itself.[266] Accordingly, under the present rule, a judge can predicate an R.C.M. 707(d) dismissal not only on a violation of the speedy trial rule itself, but also on a violation of a detained accused's right to speedy trial under Article 10, Article **33,** the priority provisions of the FSTA, the Sixth Amendment, or any other valid law or regulation.[267]

If the judge finds a constitutional speedy trial violation, dismissal with prejudice is the only possible remedy.[268] If, on the other hand, any other speedy trial violation has occurred, including an Article 10 violation, R.C.M. 707(d) requires the judge to determine the characterization of the dismissal by using the four-factor test.[269] *Kossman,* therefore, essentially ignores that the present rule facili-

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[266] *Compare,* MCM, ***supra*** note 9, R.C.M. 707(d) (C5, **15** Nov. 1991) ("failure to comply with ***the right to a speedy trial*** will result in dismissal of the affected charges") (emphasis added) ***with id.*** R.C.M. 707(e) (C3, 1 June 1987) ("failure to comply with ***this rule*** shall result in dismissal of the affected charges") (emphasis added).

[267] ***See*** Dettinger v. United States, **7** M.J. **216,** 224 (C.M.A. 1979) (citing United States v. Walker, 47 C.M.R. 288, **290** (A.C.M.R. 1973)) (dismissing charges based on violation of regulatory speedy trial provision appearing in **Air** Force military justice manual); *cf.* Richard R. Boller, ***Pretrial Restraint in the Military,*** 50 MIL. L. **REV.** 71, 97 & n.137 (1970) (pointing out that local commands may enact regulations that limit the duration of pretrial confinement). A division commander's decision to give his or her service members speedy trial rights greater than those appearing in R.C.M. 707 is no less valid than the President's decision to give all service members speedy trial rights greater than those appearing in Article 10 and the Sixth Amendment. Accordingly, if a service member accrues any regulatory "right" to a speedy trial that is more protective than the guarantee contained in the Sixth Amendment, that enhanced regulatory protection is, nonetheless, a "right." Therefore, because the present R.C.M. 707(d) does not distinguish among the sources of speedy trial rights—as the former R.C.M. 707(e) did—the remedy under the current rule is much more farreaching. ***See also*** GILLIGAN & **LEDERER,** *supra* note 242, **§ 17-60.00,** at 655-56 (discussing regulatory 45-day speedy trial rule formerly employed by United States Army Europe).

[268] ***See*** MCM, ***supra*** note 9, R.C.M. 707(d) (C5, 15 Nov. 1991).

[269] ***Id.***; ***see supra*** text accompanying notes 261-62.

tates the possibility of a dismissal without prejudice as the remedy for an Article 10 violation. More importantly, Kossman means that the court yielded some of its authority to the "President's comprehensive speedy trial scheme."[270] Accordingly, notwithstanding Kossman's admonition that "[tlhe remedy for an Article 10 violation must remain dismissal with prejudice," the court's next step may be to defer to the President the authority to prescribe the remedy for all subconstitutional speedy trial violations.

The second flaw in Kossman's logic is that it erroneously concludes that an "excusable or unavoidable" delay militates against an Article 10 violation and the concomitant need to dismiss the affected charges with prejudice.[271] The Kossman majority apparently ignored the prospect of situations in which a judge could find an Article 10 violation, but nevertheless could determine that the subject delay was "excusable or unavoidable" under R.C.M. 707(d)'s four-part test.[272] Earlier in its opinion, however, the court acknowledges the possibility of such an outcome, noting that "[mlerely satisfying presidential standards does not insulate the Government from the sanction of Article 10."[273]

Significantly, R.C.M. 707(d)'s four-part test comprises the presidential standards to which the court referred. That test requires a judge to consider four factors: (1) the seriousness of the alleged offense; (2) the reasons for delay; (3) the effect of reprosecution on the administration of justice; and (4) prejudice to the accused. On the other hand, after Kossman, the four-part test delineated in Barker *v. Wingo,*[274]—whose elements correspond to the military's "reasonable diligence" factors[275]— will define the Court of Military Appeals' standard for measuring Article 10 compliance. Like R.C.M. 707(d), this pre-Burton standard also requires the judge to consider four factors: (1) the length of the delay; (2) the reasons for delay; (3) the assertion of the right; and (4) prejudice to the accused. Clearly, neither one of these tests subsumes the other. Furthermore, because both of the tests require a court to balance all four factors, even the common elements—reasons for delay and prejudice to the accused—may receive substantially more weight when applied to one test than when applied to the other.

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[270] *Kossman, 38* M.J. at 258.

[271] *Id.* at 262.

[272] *See* MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991); ***see*** *also supra* notes 261-62 and accompanying text.

[273] *Kossman*, 38 M.J. at 261.

[274] 407 U.S. 514, 523 (1972).

[275] *See Kossman,* 38 M.J. at 259-60, 262; United States **v.** Tibbs, 35 C.M.R. 322. 325 (1965).

For example, consider a case in which the government has violated the 120-day speedy trial rule.[276] Applying the pre-Burton reasonable diligence standard, a court also might find an Article 10 violation based, in part, on a finding that the length of the delay outweighed the reasons for the delay.[277] Presumably, this Article 10 violation, consistent with Kossman, would require the court to dismiss the affected charges with prejudice. In accordance with the four-part test of R.C.M. 707(d), however, the court nevertheless may determine that reinstitution of proceedings should be permissible because the seriousness of the offense outweighed the reasons for the delay. Consequently, under the current R.C.M. 707 speedy trial scheme, a court's conclusion that a trial delay was "sufficiently excusable . . . to permit reinstitution of the charges" does not mean that the government has complied with Article 10.

To reconcile the language of R.C.M. 707(d) with the remedial requirements of Article 10, the President should eliminate "seriousness of the offense" and "the impact of reprosecution on the administration of justice" as factors bearing on the characterization of dismissal.[278] The two factors bear no relationship to an accused's personal speedy trial rights or to the issue of whether the government's delay was oppressive, unreasonable, or unfair. Indeed, evidence on either one of these factors would be irrelevant to a charge against a government official who deliberately delayed court-martial proceedings.[279] Moreover, the factors defy objective measurement; they indicate no criterion, such as degree of violence, cost to the victim, or importance in principle, for a court to consider in making a decision. Although the elimination of these two elements would diminish R.C.M. 707(d)'s similarity to the FSTA, it clearly would make the President's comprehensive statutory scheme more compatible with the interests that Article 10 seeks to protect.

D. Restricting the Postdismissal Speedy *Trial* Time Limit

The present version of the Manual provides for the 120-day speedy trial time period to restart after the government dismisses the affected charges.[280] This rule, set out in R.C.M. 707(b)(3)(A),

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[276] *See* MCM, *supra* note 9, R.C.M. 707(a) (C5, 15 Nov. 1991).

[277] *Cf. Kossman*, 38 M.J. at 261 ("We see nothing in article 10 that suggests that speedy trial motions could not succeed where a period under 90—or 120—days is involved).

[278] *Cf.* LAFAVE & ISRAEL, *supra* note 30, at 685 (societal interests should play no part in analyzing an individual's personal right to a speedy trial).

[279] *See* UCMJ art. 98 (1988) ("Any person subject to this chapter who . . . is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter . . . shall be punished as a court-martial may direct.").

[280] *See* MCM, *supra* note 9, R.C.M. 707(b)(3)(A) (C5, 15 Nov. 1991).

states that, "[i]f charges are dismissed, . . . a new 120-day time period under this rule shall begin on the date of dismissal . . . for cases . . . in which the accused is in pretrial restraint."[281] Read in conjunction with the remedial procedures, which allow for dismissal without prejudice,[282] the effect of this rule is manifest. It gives the prosecution another 120 days of regulatory speedy trial time to retry a case while an imprisoned service member continues to await his or her trial, after the government already has committed a speedy trial violation. Significantly, because the rule does not limit the number of times that a court could dismiss a particular charge without prejudice, the President's speedy trial scheme conceivably could allow an accused to languish in pretrial detention while the government aggregates multiple 120-day time periods.[283] The effect of the rule is especially peculiar, considering the drafters' comment that "[t]he harm to be avoided is continuous pretrial confinement."[284]

The present R.C.M. 707(b)(3)(A), therefore, provides another example of how the current regulatory speedy trial mechanisms lawfully could tolerate the uninterrupted pretrial detention of a presumptively innocent service member for periods far in excess of the those envisaged by Article 10's "immediate steps" mandate.[285] If the government has charged a service member with a serious offense, he or she may prevail on multiple speedy trial motions, yet never gain the predicate dismissal with prejudice necessary for his or her release. Even if, *arguendo,* an "excusable or unavoidable" delay should vitiate a speedy trial violation sufficiently to allow the government to reprosecute a service member who already has been in pretrial confinement for 120 days,[286] allowing the government to have another, full 120 days to do so is unconscionable.

Accordingly, the President should change R.C.M. 707(b)(3)(A) to limit the period of extended incarceration after a charge has been dismissed on account of a speedy trial violation.[287] In particular, the drafters should consider a rule that requires the government to try

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[281] *Id.*

[282] *Id.* R.C.M. 707(d).

[283] *Cf. id.* R.C.M. 707(d) (indicating that a court need not consider the length of the delay as a factor in deciding to dismiss a charge with or without prejudice).

[284] *Id.* R.C.M. 707(b)(3)(B) analysis, at 9.

[285] *See* UCMJ art. 10 (1988); cf. United States v. Burton, 44 C.M.R. 166, 171-72 (imposing a presumption of an Article 10 violation after just 90 days of pretrial detention).

[286] *See* United States v. Kossman, 38 M.J. 258, 262 (C.M.A.1993).

[287] *See supra* notes 244-51 (proposing the resurrection of the 90-day release rule; MCM, *supra* note 9, R.C.M. 707(d) (C3, 1 June 1987) (current version is R.C.M. 707 (C5, 15 Nov. 1991)) If the President reinstates the 90-day release rule, amending R.C.M. 707(b)(3)(A) would be unnecessary.

or to release an accused in pretrial confinement within thirteen days after any dismissal without prejudice based on R.C.M. 707(d). The suggestion of thirteen days is not talismanic, but nor is it arbitrary; it derives from the sum of the eight-day rule from Article 33[288] and the five-day rule of R.C.M. 602.[289] Because the government already would have conducted a preliminary investigation[290] on the affected charge, eight days is a generous time period to allow the accused's commander to forward the case to the general court-martial convening authority for rereferral. Furthermore, because the government presumably was prepared to proceed immediately when it fought—and lost—the subject speedy trial motion, five additional days is sufficient time to reconvene the court and to proceed anew. Consequently, if the President retains the facility to dismiss charges affected by a speedy trial violation without prejudice, a thirteen-day release rule would provide added protections to the liberty interests of service members in pretrial detention, thereby making R.C.M. 707's comprehensive speedy trial scheme more consistent with the speedy trial guarantees of Article 10 and the Sixth Amendment.

VIII. Conclusion

Because of the recent amendments to R.C.M. 707 and the Court of Military Appeals' decision in *United States v. Kossman*,[291] the present structure for assuring the right to a speedy trial to service members in pretrial detention is inconsistent with the statutory mandates of Article 10 and Article 33. By promulgating Change 5 to the *Manual,* the President extended the time limit for trying a service member in pretrial confinement,[292] eliminated the provision in the *Manual* that limited the duration of an accused service mem-

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[288] *See* UCMJ art. 33 (1988) ("the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers to the officer exercising general court-martial jurisdiction").

[289] *See* MCM, *supra* note 9, R.C.M. 602 ("no person may, over objection, be brought to trial . . . before a general court-martial within a period of five days after service of charges"). ***See generally*** United States v. Cherok, 19 M.J. 559 (N.M.C.M.R. 1984), affd, 22 M.J. 438 (C.M.A. 1986).

[290] *See* UCMJ art. 32 (1988); MCM, *supra* note 9, R.C.M. 405.

[291] 38 M.J. 258 (C.M.A. 1993).

[292] *Compare* MCM, *supra* note 9, R.C.M. 707(a)(2) (C5, 15 Nov. 1991) (requiring trial of an accused within 120 days of arrest or confinement) *with id.* R.C.M. 707(d) (C3, 1 June 1987) (requiring trial or release of an accused within 90 days of arrest or confinement).

ber's pretrial arrest or confinement,[293] attenuated the checking mechanism for ensuring that a detained accused received an expedited investigation and review of his or her charges,[294] allowed for dismissal of charges without prejudice as the remedy for speedy trial violations that violated Article 10,[295] and provided for the lengthy reprosecution of a pretrial detainee of whom the government already has deprived the right to a speedy trial.[296] Coincidentally, by abolishing the *Burton* ninety-day rule,[297] the Court of Military Appeals eliminated "any real chance for compliance with Article 10."[298]

While Congress has left these important speedy trial laws intact,[299] the President and the courts have rendered Article 10 edentate.[300] Consequently, a dilatory prosecution now can snatch victory from the jaws of a speedy trial motion that, in the past,

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[293] *Id.* R.C.M. 707(d) (C3, 1 June 1987) (ninety-day release rule) [current version is R.C.M. 707 (C5, 15 Nov. 1991)).

[294] *See supra* notes 252-58. *Compare* MCM, *supra* note 9, R.C.M. 707(c)(1) discussion, at 7 (C5, 15 Nov. 1991) ("Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.") *with id.* R.C.M. 707 discussion (C3, 1 June 1987) (providing no suggestion that a convening authority delegate his or her authority to grant continuances during the pendency of a preliminary investigation).

[295] *See supra* notes 261-64. *Compare* MCM, *supra* note 9, R.C.M. 707(d) (C5, 15 Nov. 1991) (allowing judge to use a four-factor test to dismiss, without prejudice. charges affected by a violation of the accused's right to a speedy trial) *with id.* R.C.M. 707(e) (C3, 1 June 1987) (prescribing dismissal with prejudice as the only sanction for government's violation of the speedy trial rule).

[296] *See supra* notes 280-86; MCM, *supra* note 9, R.C.M. 707(b)(3)(A) (C5, 15 Nov. 1991) (providing government with additional 120-day period to reprosecute after a dismissal without distinguishing the reasons for the dismissal).

[297] *See* United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971), *overruled* by United States v. Kossman, **38** M.J. 256 (C.M.A. 1993).

[298] *Kossman*, 38 M.J. at 268 (Wiss, J., dissenting).

[299] *See* The Military Justice Act of 1982, S. **2521,** 97th Cong., 2d Sess. (1982). The Senate captioned this unenacted statute, "A Bill to amend chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to improve the military justice system, and for other purposes." *Id.* Significantly, the bill apparently was the closest Congress came, in recent years, to proposing a change to Article 33. The proposal, in pertinent part read, "Section 833 (article 33) is amended by striking out "the investigation" and inserting in lieu thereof "any investigation conducted under section 832 of this title (article 32)." *Id.* sec. 3(i). Evidently Congress saw fit to leave Article 33—and Article 10—alone.

[300] THE AMERICAN HERITAGE DICTIONARY 414 (New College ed. 1976) ("edentate" is an adjective meaning "lacking teeth); *cf.* SCHLUETER, *supra* note 91, § 13-3(C)(2), at 439 ("The Court of Military Appeals decision in *United States v. Burton* added teeth to the Article 10 provisions which provide no specific time limits for bringing an accused to trial) (footnote omitted); *Burton*, 44 C.M.R. at 172.

would have assured the government's defeat. Moreover, these changes apparently portend a trend leading to the evisceration of the enhanced speedy trial rights historically enjoyed by service members.[301] In their unexplained efforts to make the Rules for Courts-Martial consistent with federal criminal procedure, the drafters have tried to adapt the provisions of the FSTA to military practice, largely abandoning the separate and distinct protections that Congress bestowed on service members in UCMJ Article 10. Furthermore, these efforts have led to a drift in the course of speedy trial law—a course on which the military justice system has become the sightless follower, rather than the visioned leader.[302]

Nevertheless, in the absence of leadership in the form of change, defense attorneys likely will attempt to fashion claims of de jure speedy trial violations, calling on the language of the Federal Speedy Trial Act[303]—an act that, paradoxically, R.C.M. 707 purports to emulate. Consequently, in amending R.C.M. 707, the drafters carefully must reexamine the nuances in federal speedy trial law. They also must acknowledge that, because the speedy trial scheme that Congress established in the FSTA is not only comprehensive, but also unitary, the military cannot necessarily "pick and choose" among its provisions and adopt only those that appear to be adaptable to military practice. Finally, and most importantly, the drafters must recognize that Article 10—not the FSTA—is the penultimate guarantee of an accused's right to a speedy trial in the military.

The President now has a unique opportunity to change the military's speedy trial protections for the better. The Court of Military Appeals' decision in *Kossman* indicates its reluctance to preempt an area of the law in which the President has established a comprehensive regulatory scheme. Accordingly, perhaps the best news about *Kossman* is that the demise of the *Burton* ninety-day rule means that the President now can refine military speedy trial rules in a judicial vacuum.[304] Specifically, the drafters should amend R.C.M. 707 so it reifies the priority that the Sixth Amendment right to a speedy trial and Article 10 implicitly guarantee to incarcerated defendants. In particular, the rule should enforce

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[301] *See Kossman*, 38 M.J. at 263 (Wiss, J., dissenting) (characterizing *Kossman* as "a step backwards"); GILLIGAN & LEDERER, *supra* note 242, § 17-10.00, at 623 (noting that service members, as compared to their civilian counterparts, receive "unparalleled" speedy trial protections).

[302] *See* WINTHROP, *supra* note 3, preface.

[303] 18 U.S.C. §§ 3161-3174 (1988). Practitioners plausibly can interpret the FSTA so that the provisions mandating priority treatment for cases in which the defendant is in pretrial detention apply to the military. *See supra* notes 225-30.

[304] *Cf. Kossman*, 38 M.J. at 261 ("*Burton* presumption was court-made and declared in a procedural vacuum.").

a ninety-day release rule to limit the length of a service member's pretrial arrest and incarceration, reinforce—rather than confute—the speedy trial protections of Article **33,** limit the reasons that would allow the government to reprosecute a case in the wake of a speedy trial violation, and protect an accused from the aggregation of pretrial detention periods caused by the hollow sanction of dismissal without prejudice.

The changes to the speedy trial provisions in the *Manual for Courts-Martial* and the demise of the *Burton* ninety-day rule signaled an end to the era of objectivity in measuring speedy trial rights under military law. For the presumptively innocent service member in pretrial detention, Article 10 survives as the sole promise that his or her case will receive the relative attentiveness it deserves, consistent with the constitutional precepts from which the right to a speedy trial derives. The President, through the Rules for Courts-Martial, should fulfill that promise by seriously enforcing all of the statutory speedy trial rights that Congress has deemed necessary and proper to the prompt and fair administration of military justice.

A MODEST PROPOSAL: PERMIT INTERLOCUTORY APPEALS OF SUMMARY JUDGMENT DENIALS

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I. Introduction

Summary judgment motions under Federal Rule of Civil Procedure (FRCP) 56 implement the fundamental policy of the Federal Rules "'to secure the just, speedy and inexpensive determination of every action.'"[1] The precepts governing summary judgment motions apply to virtually any cause of action, including employment discrimination,[2] secured transactions,[3] taxation,[4]

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[1]William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465 (1984) (citing FED. R. CIV. P. 1); *see also* Zavislak v. United States, 29 Fed. Cl. 525, 527-28 (1993).

[2]Mitchell v. Data Gen. *Corp.,* 12 F.3d 1310 (4th Cir. 1993) (Age Discrimination in Employment Act); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035 (7th Cir. 1993) (Civil Rights Act of 1964); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993) (Rehabilitation Act of 1973).

[3]*In re* Haste, 2 F.3d 1042 (10th Cir. 1993) (bankruptcy court granted summary judgment, holding that under Oklahoma law, perfected security interest in stock did not continue in the dividends).

[4]Cooper v. United States, 827 F. Supp. 1309 (E.D. Mich. 1993) (challenging liability for withholding tax delinquencies).

patents,[5] First Amendment rights,[6] denaturalization,[7] admiralty,[8] and civil forfeiture actions.[9]

Federal Rule of Civil Procedure 56 serves the laudable purposes of isolating and disposing of factually unsupported claims and defenses,[10] preventing vexation and delay, expediting disposition of cases, and avoiding unnecessary trials when no genuine issue of material fact exists.[11] The Rule is a practical tool of governance designed to "head off a trial, with all the private and public expenses that a trial entails, if the opponent . . . of summary judgment does not have a reasonable prospect of prevailing before a reasonable jury . . . ."[12]

Summary judgment is not limited to an entire claim or defense, but may be sought and granted as to any portion thereof.[13] This device simplifies the trial and allows the litigants to better pre-

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Carroll Touch v. Electro Mechanical Sys., 3 F.3d 404 (Fed. Cir. 19931 (affirming summary judgment in patent infringement case); Accent Designs, Inc. v. Jan Jewlry Designs, Inc., 827 F. Supp. 957 (S.D.N.Y.1993) (patent holder's allegations of infringement).

[6]Baugh v. CBS, Inc., 828 F. Supp. 745, 752 (N.D. Cal. 1993) ("Summary disposition is particularly favored in cases involving First Amendment rights."); *see also* Johnson v. Robbinsdale Ind. School Dist. 281, 827 F. Supp. 1439, 1442 (D. Minn. 1993) (Summary judgment "is favored in defamation cases involving public officials because it prevents the discouragement of full and free expression of a person's First Amendment rights concerning the conduct of their government.").

[7]United States v. Breyer, 829 F. Supp. 773, 775 (E.D. Pa. 1993) ("Even with the heavy burden of proof placed upon the government in naturalization cases, summary judgment remains applicable in such actions.").

[8]McKinley v. Afram Lines (USA) Co., 834 F. Supp. 510, 514 (D. Mass. 1993) ("The standard for allowance of a summary judgment motion in an admiralty case is synonymous with that applied in non-admiralty cases.").

[9]United States v. 717 S. Woodward St., **2** F.3d 529, 532 (3d Cir. 1993) (citations omitted); United States v. Eleven Vehicles, 836 F. Supp. 1147 (E.D. Pa. 1993); United States v. $319,603.42 in United States Currency, 829 F. Supp. 1223 (D. Or. 1992) ("In a civil forfeiture case, the summary judgment procedures must be construed in light of the statutory law of civil forfeitures, and particularly the procedural requirements of such cases.").

Welotex Corp. v. Catrett, 477 U.S. 321, 324 (1986) ("isolate and dispose of factually unsupported claims or defenses"); Harris v. Roberts, 817 F. Supp. 895 (D. Kan. 1993); Southern v. Emery Worldwide, 788 F. Supp. 894, 895 (S.D. W.Va. 19921 ("isolate and dispose of meritless litigation").

[11]10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712, at 564-67 (1983); *see* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.1, at 434 (1985) ("the main purpose of summary judgment is to avoid useless trials . . . ."); *see also* Bourne v. Tahoe Regional Planning Agency, 829 F. Supp. 1203, 1205 (D. Nev. 19931 ("avoid unnecessary trials when there is no dispute as to the facts before the court"): *In re* Southeast Banking Corp., 827 F. Supp. 742, 752 (S.D. Fla. 1993) ("purpose of Rule 56 is to eliminate the needless delay and expense to the parties and to the court occasioned by an unnecessary trial").

[12]Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

[13]FRIEDENTHAL, *supra* note 11, §9.1, at 433.

pare for it by eliminating certain claims and defenses from the trial process.[14]

The United States Supreme Court has opined that courts should not view motions for summary judgment as disfavored procedural shortcuts, but as an integral part of the *Federal Rules of Civil Procedure* as a whole.[15] Moreover, whenever a moving party satisfies its burden under FRCP 56, the "plain language of [the rule] *mandates* the entry of summary judgment;"[16] the moving party is entitled to judgment "as a matter of law."[17] Indeed, trial judges have an affirmative obligation to prevent factually unsupported claims and defenses from going to trial,[18] and possess the power to enter summary judgment *sua sponte,* so long as the losing party was on notice that it had an opportunity to present its evidence.[19]

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[14]*Id.* at 434-35. Summary judgment is appropriate to resolve issues of law, such as the meaning of statutes. WKB Enter., Inc. v. Ruan Leasing Co., 838 F. Supp. 529, 532 (D. Utah 1993).

Welotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); *see also* Harris v. Palmetto Tile, Inc., 835 F. Supp. 263,264 (D.S.C. 1993); Independent Drug Wholesalers Group, Inc. v. Denton, 833 F. Supp. 1507, 1514 (D. Kan. 1993); Collins v. Kahelski, 828 F. Supp. 614, 618 (E.D. Wisc. 1993); Heredia v. Johnson, 827 F. Supp. 1522, 1524 (D. Nev. 1993); Butler v. Navistar Int'l Transp. Corp., 809 F. Supp. 1202, 1205 (W.D. Va. 1991).

[16]*Celotex*, 477 U.S. at 322 (emphasis added); see *also* McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807, 818 (1991) ("mandated"); Waldridge v. American Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994) ("court must enter summary judgment"); Real Estate Fin. v. Resolution Trust Corp., 950 F.2d 1540, 1543 (11th Cir. 1992) ("must grant"); Idaho Farm Bureau Fed'n v. Babbitt, 839 F. Supp. 739, 744 (D. Idaho 1993) (summary judgment is mandated); Security Serv. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("must enter summary judgment"); Marrero Garcia v. Irizarry, 829 F. Supp. 523, 526 (D. P.R. 1993) ("mandates"); Kauffman v. Kent State Univ., 815 F. Supp. 1077, 1081 (N.D. Ohio 1993) ("mandates"); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399, 1402 (D. Minn. 1992) ("must grant"); Allstate Ins. Co. v. Norris, 795 F. Supp. 272, 274 (S.D. Ind. 1992) ("when the standard embraced in Rule 56(c) is met, summary judgment is mandatory"); Colizza v. United States Steel Corp., 49 Fed. Empl. Practice Cases (BNA) 779, 781 (W.D. Pa. 1989) ("mandates"). But *cf.* Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989) ("A district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.").

[17]*Celotex,* 477 U.S. at 323.

[18]Drewitt v. Pratt, 999 F.2d 774, 778-79 (4th Cir. 1993); Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479, 483 (4th Cir. 1989) (Murnaghan, C.J., concurring); Felty v. Graves-Humphreys, 818 F.2d 1126, 1128 (4th Cir. 1987).

[19]*Celotex,* 477 U.S. at 326; Yu v. Peterson, 13 F.3d 1413, 1415 n.3 (10th Cir. 1994); Balogun v. Immigration and Naturalization Serv., 9 F.3d 347, 352 (5th Cir. 1993) ("governed by Rule 56's requirement of ten days notice and an opportunity to respond"); Stells v. Town of Tewksbury, Mass., 4 F.3d 53 (1st Cir. 1993); Waterbury v. T.G.&Y Stores Co., 820 F.2d 1479, 1480 (9th Cir. 1987) ("a district court may grant a summary judgment *sua* sponte if the losing party 'had a full and fail opportunity to ventilate the issues involved in the motion.'") (citation omitted); Benito-Hernando v. Gavilanes, 849 F. Supp. 136, 139 (D.P.R. 1994) (power to grant summary judgment sua sponte); Triomphe Investors v. City of Northwood, 835 F. Supp. 1036, 1046 & n.9 (N.D. Ohio 1993) (sua sponte grant of summary judgment); McLaughlin v. Compton,

Despite FRCP 56's laudable purposes and the Supreme Court's strong pronouncements of entitlement, occasionally judges deny motions for summary judgment when summary disposition is clearly warranted.[20] A misunderstanding of the current state of the law, issue and factual complexity, time constraints caused by an overburdened trial docket, and/or personal bias or individual notions of justice may serve as the genesis for improperly denied summary judgment motions.[21]

Unfortunately, the law fails to provide an adequate mechanism to challenge improperly denied summary judgment motions. Generally,[22] courts hold that the denial of a FRCP 56 motion is an

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834 F. Supp. 743, 746 (E.D. Pa. 1993) (court may award summary judgment to nonmoving party without necessity of formal cross motion); Jacobson **v.** Cohen, 151 F.R.D. 526, 528 (S.D.N.Y. 1993); *see also* 10A WRIGHT, *supra* note 11, §2720, at 27-28 (If it provides advance notice and an opportunity to demonstrate why summary judgment is inappropriate, the court may act *sua sponte.).*

[20]John P. Frank, *The Rules Of Civil Procedure—Agenda for Reform,* 137 U. PA. L. REV. 1883, 1894 (1989) ("many of the lower courts . . . still are caught in the 'any factual dispute' notion as a reason for denying summary judgment without evaluating whether the factual dispute really is of any legal consequence."); Paul D. Carrington, *Making Rules* to *Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Duns-Substantive Rules of Civil Procedure,* 137 U. PA, L. REV. 2067, 2097 (1989) ("Rule 56 has been enfeebled by courts reluctant to take responsibility for asserting the genuineness of contentions."); *see also* Buenrostro **v.** Collazo, 973 F.2d 39, 42 n.2 (1st Cir. 1992) ("We recognize that, in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed."); Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989) ("A district judge has the discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.").

[21]*See* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?,* 63 NOTRE DAME L. REV. 770, 780 (1988) (" 'many courts persist in denying summary judgment in cases in which a directed verdict might well be granted, merely on the basis of the ill-conceived belief that justice always is better served by permitting the litigant a day in court.'")(citation omitted); *Id.* at 787 (the failure of courts to properly analyze aspects of summary judgment have resulted in improperly denied motions).

[22]Denial of a motion of summary judgment based on a claim of absolute or qualified immunity falls under the collateral order doctrine exception to the general rule against immediate appellate review. Puerto Rico Aqueduct and Sewer Auth. **v.** Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993); Mitchell v. Forsyth, 472 U.S. 511, 526-28 (1985); Latimore v. Johnson, 7 F.3d 709, 711 n.1 (8th Cir. 1993); Harris v. Coweta County, 5 F.3d 507, 510 (11th Cir. 1993); Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir. 1992); *see generally infra* notes 394-422 and accompanying text. *But cf.* Hare v. City of Corinth, Miss., 36 F.3d 412, 417 (5th Cir. 1994) (appeal of motion for summary judgment based on qualified immunity denied because the "appeal presents more than a pure question of law"). The denial of an official qualified-immunity status is immediately appealable because it " 'conclusively determines the defendant's right not to stand trial."' *Mitchell,* 472 U.S at 527; Reed v. Woodruff County, Ark., 7 F.3d 808, 810 (8th Cir. 1993). Further, denial of a motion for summary judgment that has the practical effect of dismissing the case with prejudice is a final, appealable order, Lody v. Secretary of Health, Educ. and Welfare, 451 F.2d 871, 872 (9th Cir. 1971) (record review of disability determination).

interlocutory order that is not appealable.[23] The primary policy reason supporting this general rule is to avoid piecemeal appeals.[24]

Theoretically, on entry of final judgment, interlocutory orders merge into the court's final order and become subject to appellate review.[25] However, most jurisdictions will not permit a party to appeal a summary judgment denial after a full trial on the merits.[26] Because the moving party may not seek an immediate appeal of the

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[23]10 WRIGHT, supra note 11 § 2715, at 636; 4 AM. JUR. 2d Appeal and *Error* § 104 at 622 (1962) ("the denial of a motion for summary judgment is an interlocutory decision only and therefore not directly appealable . . . ."); see also Pacific Union Conf. Of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306 (1977); Reed v. Woodruff County, Arkansas, 7 F.3d 808, 809-10 (8th Cir. 1993) ("not a final order and is therefore not usually appealable until the conclusion of the case on the merits"); Harris v. Coweta County, 5 F.3d 507, 510 (11th Cir. 1993) ("denial of a motion for summary judgment is not a final decision and no appeal lies from it"); McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 253 (10th Cir. 1993) (ordinarily not an appealable final order); Manion v. Evans, 986 F.2d 1036, 1038 (6th Cir. 1993) (not a final order); Jones-Hamilton v. Beazer Materials & Serv., 973 F.2d 688, 691-92 (9th Cir. 1992); Johnson v. Greater Southeast Community Hosp. Corp., 951 F.2d 1268, 1277 (D.C. Cir. 1991) ("general principle that a denial of a motion for summary judgment is not a reviewable final decision"); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 353 n.55 (7th Cir. 1988) ("interlocutory and thus nonappealable"); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278-79 (5th Cir. Unit A Mar. 1981); Valdosta Livestock Co. v. Williams, 316 F.2d 188 (4th Cir. 1963). A court's denial of a motion to reconsider the denial of a summary judgment motion is not an appealable order. Pruett v. Choctaw County, Alabama, 9 F.3d 96 (11th Cir. 1993).

[24]Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 24-25 (1966); Sears, Roebuck & Co., 839 F.2d at 353 n.55; Whalen v. County of Fulton, 19 F.3d 828, 830 (2d Cir. 1994); Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971).

[25]*Jones-Hamilton,* 973 F.2d at 694 n.2; United States v. 228 Acres of Land and Dwelling, 916 F.2d 808, 811 (2d Cir. 1990); Sears, Roebuck & Co., 839 F.2d at 353 n.55.

[26]Watson v. Amedco Steel Inc., 29 F.3d 274, 277 (7th Cir. 1994) ("denial of a motion for summary judgment is not subject to review once the district court has conducted a full trial on the merits of a claim"); Schmidt v. Farm Credit Serv., 977 F.2d 511, 513 n.3 (10th Cir. 1992); Lum v. City and County of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992) ("hold[ing] that there is no need to review denials of summary judgment after there has been a trial on the merits."); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) ("Denial of summary judgment is not properly reviewable on appeal from a final judgment entered after a full trial on the merits."); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990) ("where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed"); Holley v. Northrop Worldwide Aircraft Serv., Inc., 835 F.2d 1375, 1378 (11th Cir. 1988) ("a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which mitigate against his case"); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986) ("a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial."), cert. dismissed, 479 U.S. 1072 (1987). Appellate courts will not overturn a verdict based upon the erroneous denial of summary judgment. Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 n.4 (10th Cir. 1992) (unable to find such a case), cert. denied, 113 S. Ct. 1417 (1993); Jarrett, 896 F.2d at 1016 n.1 ("After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied."); *cf.* Watson, 29 F.3d at 277 (issue becomes moot).

improper denial, it must face the painful choice of bearing the risk and expense of trial[27] or succumbing to judicial[28] and self-imposed pressures to settle.[29]

This article traces the history of summary judgment procedure, culminating with a discussion of the current state of summary judgment law in the federal system. In 1986, the Supreme Court liberalized summary judgment procedure to encourage its use as a means to dispose of factually unsupported cases. Additionally, the article will examine particular issues that often result in the erroneous denial of summary judgment. The article then examines the inadequacy of mandamus, the collateral order doctrine, and certification under 28 U.S.C. § 1292(b) as mechanisms to obtain immediate appellate review of summary judgment denials. Finally, the article proposes means by which improper denials could gain immediate appellate review.

The scope of this article is limited to occasions when a court improperly denies a properly supported motion for summary judgment on the merits. The article does not address partial summary judgments, but focuses on summary judgment motions that, if granted, would resolve all aspects of the case.

Distinguishing a FRCP 56 motion from a motion to dismiss under FRCP 12(b) and a motion for judgment on the pleadings under FRCP 12(c) is important. A motion to dismiss usually raises a matter of abatement and a dismissal is without prejudice; the party may reassert the claim once it corrects the defect.[30] A motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a necessary party only envisions a dismissal of proceeding; it is not

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[27]It would be intellectually dishonest to assert that all juries base their decisions on the facts and law. Unfortunately, some juries decide cases based on "sympathy, antipathy or private notions of justice." *Cf.* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989)(tacitly recognizing the existence of such juries).

[28]Marc S. Galanter, *The Federal Rules and the Quality of Settlements: A Comment On Rosenburg's, The Federal Rules Of Civil Procedure in Action,* 137 U. PA. L. REV. 2231, 2233 (1989) ("tremendous push in recent years to encourage settlement with an eye to lowering the demands on courts").

[29]Donald F. Turner, *Private Antitrust Enforcement: Policy Recommendations, in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 407 (Lawrence J. White ed., 1988) ("[A] substantial number of private antitrust cases are ill-founded, brought in hopes of obtaining substantial cash settlements from defendants seeking to avoid the costs of litigation and the risk that bits of evidence will lead to adverse jury verdicts.").

[30]10 WRIGHT, *supra* note 11 § 2713, at 592; *see also* Nichols v. Mower's News Serv., Inc., 492 F. Supp. 258, 260 (D. Vt. 1980) ("dismissal for lack of subject matter jurisdiction is a matter of abatement in that it does not bar future actions . . . .").

a judgment on the merits.[31] Further, although a motion to dismiss for failure to state a claim upon which relief may be granted addresses the claim itself, the motion merely asserts that the challenged pleading does not sufficiently state a claim of relief; the motion does not challenge the underlying merits of the claim.[32]

A motion for judgment on the pleadings contends that the moving party is entitled to judgment based on the pleadings alone and only entails an examination of the sufficiency of the pleadings.[33] Conversely, a motion for summary judgment goes beyond the pleadings and may be based on any evidence properly before the court at the time it decides the motion.[34] The summary judgment movant asserts that, based on the existing record, no genuine issue of material fact exists and it is entitled to judgment on the merits as a matter of law.[35]

Under modern practice, courts have blurred the traditional lines between challenges to the pleadings and summary judgment motions.[36] When the moving party introduces matters outside the pleadings, a court will convert motions to dismiss for failure to state a claim and motions for judgment on the pleadings into motions for summary judgment.[37] A court retains the discretion to decide

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[31] 10 WRIGHT, *supra* note 11 § 2713, at 593; *see also* Ruich v. Ruff, Weidenaar & Reily, Ltd., 837 F. Supp. 881, 883 (N.D. Ill. 1993) ("motion to dismiss concerns the sufficiency of the complaint, not the merits of the suit").

[32] 10 WRIGHT, *supra* note 11 § 2713, at 593; *see also* J.K. by and through R.K. v. Dillenberg, 836 F. Supp. 694 (D. Ariz. 1993) (tests the formal sufficiency of the pleadings and not the merits); Janopoulos v. Harvey L. Walner & Assoc., 835 F. Supp. 459, 460 (N.D. Ill. 1993) ("motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the suit."); Wolford v. Budd Co., 149 F.R.D. 127, 129 (W.D. Va. 1993) ("test only whether the claim has been adequately stated . . . .").

[33] 10 WRIGHT, *supra* note 11 § 2713, at 593.

[34] *Id.*

[35] *Id.* at 593-94.

[36] FRIEDENTHAL, *supra* note 11 § 9.1, at 434.

[37] *Id.* ("moving party introduces outside matters and clearly intends to test not only whether the allegations are sufficient on their face to state a claim, but also whether there is any factual basis for those allegations."); *see also* Building and Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1495 (10th Cir. 1993) ("Fed. R. Civ. P. 12(b) states that, where a Rule 12(b)(6) motion raises matters outside the pleadings, it shall be treated as a motion for summary judgment subject to the requirements of Fed. R. Civ. P. 56."); Green v. Forney Eng'g Co., 589 F.2d 243, 246 n.7 (5th Cir. 1979) (12(b)(6) motion converted into a motion for summary judgment); Siderpali, S.P.A. v. Judal Indus., Inc., 833 F. Supp. 1023, 1030 (S.D.N.Y. 1993) (12(c) motion treated as motion for summary judgment); Gurfein v. Sovereign Group, 826 F. Supp. 890, 898 (E.D. Pa. 1993) ("a court may not consider materials outside the pleadings and the briefs without converting a motion to dismiss into a motion for summary judgment"); Mason v. County Of Delaware Sheriffs Dep't, 150 F.R.D. 27, 29 (N.D.N.Y. 1993) (12(b)(6) motion must be treated as one for summary judgment); Wolford v. Budd Co., 149 F.R.D. 127, 132 (W.D. Va. 1993) ("could" treat 12(b)(6) motion as one for summary judgment); Flax v. United States, 791 F. Supp. 1035, 1038

whether to accept the accompanying evidence that triggers the conversion; however, once the court accepts those documents, it must convert the motion.[38] Because they address the merits of the underlying claim, converted motions fall within the scope of this article.

A court may not convert any other FRCP 12 motion into a motion for summary judgment.39 Federal Rule of Civil Procedure 12(f) does not authorize a district court judge to treat a motion to strike an insufficient defense as a motion for summary judgment.[40] Because the question of subject matter jurisdiction is inappropriate for summary judgment, a court may not convert an FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment.41 A court that dismisses a case for lack of jurisdiction never reaches the merits of the action.[42]

Accordingly, this article advances the proposal that interlocutory appeal be permitted in those limited situations when an appellate court's potential reversal of a district court's order denying summary judgment, pursuant to FRCP 56, would effectively terminate the litigation. The responding district court would be required to enter an order granting summary judgment for the moving party, with a concomitant res judicata effect.[43]

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n.2 (D. N.J. 1992) (12(b)(6) motion "treated as a motion for summary judgment"). The failure to provide adequate notice to the parties that a motion to dismiss will be treated as a motion for summary judgment is reversible error. *Rockwell Int'l Corp.*, 7 F.3d at 1496.

[38]KENT SINCLAIR, SINCLAIR ON FEDERAL CIVIL PROCEDURE § 8.12, at 426 (3d ed. 1992); ***see*** *also* Palm v. United States, 835 F. Supp. 512, 515 n.1 (N.D. Cal. 1993) ("If the court does not rely on the extraneous matters, the motion to dismiss will not be converted into a motion for summary judgment."); *cf.* Snyder v. Talbot, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (in the court's discretion to consider additional materials in deciding a 12(b)(6) motion).

[39]FRIEDENTHAL, *supra* note 11 § 9.1, at 434.

[40]*Id.* at 434 n.10.

[41]Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993); ***see*** *also* Green v. Forney Engineering Co., 589 F.2d 243, 246 (5th Cir. 1979) ("may consider outside matters which are attached to a motion to dismiss without first converting it into a motion for summary judgment"); Palumbo v. Roberti, 834 F. Supp. 46, 50 (D. Mass. 1993); Southeast Bank v. Gold Coast Graphics Group, 149 F.R.D. 681, 684 n.2 (S.D. Fla. 1993) ("a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction cannot be converted into a motion for summary judgment."); Nichol's v. Mower's News Serv., Inc., 492 F. Supp. 258, 260 (D. Vt. 1980) (may consider evidentiary material without converting a 12(b)(1) motion into a motion for summary judgment).

[42]*Capitol Leasing* Co., 999 F.2d at 191; *Palumbo*, 834 F. Supp. at 50 (unrelated to the merits).

[43]Dicken v. Ashcroft, 972 F.2d 231, 233 n.5 (8th Cir. 1992) ("It is well established that summary judgment is a final judgment on the merits for purposes of res judicata.") (citation omitted).

11. Summary Judgment

A. *Historical Background*

The genesis of a "summary" proceeding in civil procedure can be traced loosely to both Roman law and medieval Canon law decreed in 1306 during the reign of Pope Clement V.[44] Pope Clement sought to create a mechanism to have legal disputes decided " 'simply, on the level, without confusion or legal formalism.' "[45] Later, medieval English merchants, engaging in much of their commerce at borough fairs, developed fair or piepowder courts that included a form of summary procedure to settle disputes.[46] Because of increased wealth and improved transportation, fairs diminished in commercial importance with a concomitant decline in the use of piepowder courts.[47] Gradually, merchants abandoned these courts and brought their mercantile disputes to the common law and chancery courts.[48]

As their dockets increased and as they adopted increasingly complex rules of procedure, the common law and chancery courts experienced lengthy delays. Unscrupulous lawyers advised their debtor-clients to exploit the highly technical rules governing pleading, causing numerous case dismissals because of defects in form.[49] Further, debtors pleaded fictitious defenses to discourage creditors from pursuing suits by the prospect of increased expense and to delay the proceedings. Significantly, because the courts had no method to examine the factual basis of a suit or defense prior to a trial on the merits, they failed to correct these tactics and the system flourished.[50]

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[44] Robert W. Millar, *Three American Ventures in Summary Civil Procedure,* 38 YALE L.J. 193, 194 (1928). Summary procedure in Continental Europe was guided by the principle of the Roman *summatim cognoscere.* Italian jurists applied a form of summary procedure prescribed by Pope Clement V's decretal *Saepe contingit,* which influenced the subsequent development of most of the modem Continental civil systems and Anglo-American chancery and admiralty procedures. *Id.* For a discussion of Roman civil procedure *see generally* P. VAN WARMELO, AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CML LAW (1976); HESSEL E. YNTEMA & A. ARTHUR SCHILLER, SOURCE BOOK OF ROMAN LAW (1929).

[45] Weather-Rite Sportswear Co. v. United States, 298 F. Supp. 508, 511 n.5 (Cust. Ct. 1969).

[46] John A. Bauman, *The Evolution of the Summary Judgment Procedure,* 31 IND. L.J. 329, 330 (1956).

[47] *Id.* at 331.

[48] *Id.* Several other factors contributed to the decline of the piepowder courts including the disruptive effects of the Hundred Years' War on credit transactions, the development of negotiable instruments, and the failure to develop early commercial courts. *Id.*

[49] *Id.* at 331-33.

[50] *Id.*

In response to mercantile pressure, Parliament enacted Keating's Act,[51] providing a summary judgment procedure to expedite the legal enforcement of debts based on bills of exchange.[52] Gradually, use of the procedure expanded in England to include virtually all actions at law.[53]

During the nineteenth century, with limited exceptions, civil procedure systems in the United States were based on English practice.[54] Forms of action were highly rigid and technical, generating much litigation over minute formalistic deviations from pleading requirements.55 American courts encountered the identical sham pleadings found in England.[56] Common law and code pleading rules mandated that a court decide a party's demurrer or similar motion based solely on the face of the pleadings.57 Accordingly, a party could not go beyond the pleadings to establish that it had no basis in fact.[58] Because courts assumed that all pleadings were in good faith, based on evidence to be presented at trial, any challenge to the truth of a pleading that stated a claim or a defense necessitated a trial.[59]

States responded to the sham pleadings by either permitting

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[51]Summary Procedure on Bills of Exchange Act, 18 & 19 Vict., c. 67 (1855). The Act required the plaintiff to obtain a writ warning the defendant that judgment would be entered against him unless the defendant obtained leave of court to appear and defend himself within twelve days of service of the writ. The court would grant such leave only if the defendant paid to the court the amount demanded in the writ, or provided affidavits raising a defense to the action. Bauman, *supra* note 46, at 338-39.

[52]Bauman, *supra* note 46, at 329-30; 10 WRIGHT, *supra* note 11, § 2711, at 556. In 1681, Scotland enacted a summary procedure on foreign bills of exchange to facilitate international trade. By 1696, Scottish law had extended this procedure, known as "summary diligence," to other commercial instruments. Bauman, *supra* note 46, at 336.

[53]10 WRIGHT, *supra* note 11, § 2711, at 556. The procedure did not apply to a limited number of torts and to breach of promise to marry proceedings. *Id.*

[54]Bauman, *supra* note 46, at 343; 10 WRIGHT, *supra* note 11, § 2711, at *556;* Jack B. Weinstein, THE GHOST OF PROCESS PAST: THE FIFTIETH ANNIVERSARY OF THE FEDERAL RULES OF CML PROCEDURE AND ERIE, 54 BROOK. L. REV. 1, 4 (1988) ("State procedures in the early nineteenth century were based on a received, modified English common law practice."); *see also* Weather-Rite Sportswear v. United States, 298 F. Supp. 508, 511-12 (Cust. Ct. 1969) ('"some of the most fruitful recent innovations in the realm of civil procedure (such as summary judgment) originated in the rule-making of the English judges.'"). Some states, notably Virginia, attempted to simplify the English writ and complaint requirements and develop true summary procedures. Bauman, *supra* note 46, at 343. In 1732, Virginia initiated a limited notice and motion for judgment procedure that was greatly expanded in 1849, applying to all common law actions. *Id.*

[55]Weinstein, *supra* note 54, at 4-5.

[56]Bauman, *supra* note 46, at 342.

[57]FRIEDENTHAL, *supra* note 11, § 9.1.

[58]*Id.* This procedure was commonly referred to as "speaking demurrers." *Id*

[59]*Id.*

motions to strike as sham or by requiring verification of the pleadings. The former failed because of the high standard of proof required and because many states did not apply these motions to general denials.[60] Verification proved ineffective because the requirement denigrated into a mere formality.[61]

In contrast to English civil procedure, which was simplified by the late 1800s, turn-of-the-century American civil procedure was in complete disarray.[62] Most state and federal courts followed different rules for actions in equity and in law.[63] Following the Conformity Act of 1872,[64] federal courts applied contemporary state procedural rules in all actions at law, which often were compartmentalized and technical.[65] Accordingly, a federal court could only grant summary judgment for an action at law if the corresponding state had made provision for this procedure.[66] Summary judgment was unavailable in federal court for actions in equity because federal equity rules failed to provide for this procedure.[67]

The revised English summary judgment procedure did not become firmly established in the United States until the twentieth century. In 1912, New Jersey became the first state to adopt a summary judgment procedure.68 Gradually, states adopted summary judgment devices as part of their civil codes; however, these codes limited summary judgment to certain classes of action69 and usually did not permit defendants to avail themselves of the procedure.[70]

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[60] Bauman, *supra* note 46, at 342-43. Some jurisdictions were unable to develop adequate standards for determining whether the pleading was sham. It was unclear whether a pleading was sham only if filed in bad faith or because existing evidence clearly refuted it. Additionally, some jurisdictions were unable to establish the type and quantum of evidence necessary to strike the pleading. FRIEDENTHAL, *supra* note 11, § 9.1.

[61] Bauman, *supra* note 46, at 342-43.

[62] Weinstein, *supra* note 54, at 6.

[63] *Id.*

[64] Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197. The Conformity Act required that the civil procedure employed by individual federal courts conform as closely as possible with the procedure of the state in which the federal court sat. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,* 137 U. PA. L. REV. 1999, 2002 (1989). The Act did not apply to equity and admiralty cases. *Id.*

[65] Weinstein, *supra* note 54, at 5-6. When federal procedural statutes and practices took precedence over conformity with state law, federal judges refused to apply the state procedures. Subrin, *supra* note 64, at 2002.

[66] 10 WRIGHT, *supra* note 11, § 2711, at 557.

[67] *Id.*

[68] Weather-Rite Sportswear v. United States, 298 F. Supp. 508, 512 (Cust. Ct. 1969) (citation omitted).

[69] 10 WRIGHT, *supra* note 11, § 2711, at 556. The scope of these categories expanded over time. *Id.*

[70] Bauman, *supra* note 46, at 344 & n.115.

Prior to the adoption of FRCP 56 in 1938, a summary judgment procedure that applied to either party and that was not dependant on the nature of the action did not exist in the United States.[71]

B. Federal Rule of Civil Procedure 56

Promulgated pursuant to the Rules Enabling Act of 1934,[72] the *Federal Rules of Civil Procedure* became effective on September 16, 1938.73 The rules provided for a nationwide uniform standard, broader judicial discretion, and the unification of equity and common law procedure.74 The proponents of the Rules Enabling Act viewed the procedural uniformity as a tool to streamline litigation and arrive promptly at an adjudication of the merits.[75]

Federal Rule of Civil Procedure 56 established the standards applicable to summary disposition of cases in federal court. The Rule was intended to play a substantial role in the expeditious resolution of cases.[76] The drafters envisioned FRCP 56 serving as the primary mechanism for disposing of facially valid claims and defenses that, when probed, proved to be groundless.77 Further, the drafters intended that summary judgment be applicable to *all* civil actions.78

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[71]*Id.* at 344.

[72]Act of June 19, 1934, ch. **651,** §§ **1** &2, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1982)).

[73]Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?,* 137 U. PA. L. REV. 1901 (1989). The Supreme Court transmitted the Rules to the Attorney General on December 20, 1937, who presented them to Congress on January 3, 1938.*Id.* For a discussion of the 1938 version of the Rules *see generally* LAWRENCE KOENIGSBERGER, AN INTRODUCTION TO THE FEDERAL RULES OF CML PROCEDURE (1938).

[74]Weinstein, *supra* note 73, at 1910; KOENIGSBERGER, *supra* note 73, at 2. The Enabling Act authorized the Supreme Court to unite the general rules of cases in equity with those in actions at law. Exercising this option, the Court abolished the distinction between the two sets of rules. Federal Rule of Civil Procedure 2 reflects the abolition, providing that there shall be one form of action known as a "civil action." *Id.*

[75]*Id.* Similarly, the drafters of the Rules sought uniformity and simplicity in order to achieve "smooth substance-oriented litigation." *Id.* at 1911.

[76]Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137* U. PA. L. REV. 2237, 2241 (1989); *see* also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11,* 137 U. PA. L. REV. 1925, 1943-44 (1989) (drafters expected summary judgment motions to "separate the wheat from the chaff").

[77]Carrington, *supra* note 20, at 2091; Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact,* 137 *U.* PA. L. REV. 2197 (1989). Judge Charles E. Clark, Reporter of the Rules Committee, sought to ensure that summary judgment motions would be granted liberally. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure,* 85 YALE L. J. 914, 928 (1976).

[78]Kevin L. Sink, M & M Medical Supplies v. Pleasant Valley Hospital: *Has the Fourth Circuit Signaled the End of a "New Era"?,* 71 N.C. L. REV. 1913 (1993) (citing FED. R. CIV. P. *56* advisory committee's note).

III. The Supreme Court Trilogy and Existing Summary Judgment Law

A. The Supreme Court Trilogy

Prior to 1986, much of the federal judiciary was reluctant to grant motions for summary judgment.[79] The Supreme Court warned against "trial by affidavits" and did not hesitate to reverse grants of the motion.[80] As late as 1979, the Supreme Court cautioned lower courts against granting summary judgment in cases involving state-of-mind issues.[81] The United States Court of Appeals for the Second Circuit (Second Circuit) required the trial judge to deny a summary judgment motion if the judge had the "slightest doubt" as to the motion's propriety.[82] The United States Court of Appeals for the Fifth Circuit (Fifth Circuit) developed a reputation for reversing summary judgment grants causing one federal district court judge in New Orleans to post the sign, '"No Spitting, No Summary Judgments.'"[83]

Heralded as bringing about a "new era" for summary judgments,[84] three 1986 Supreme Court decisions effected a decided

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[79] *Id.* ("In its early years, summary judgment merely represented an infrequently used method for disposing of clearly frivolous or unsubstantiated lawsuits."); Hazard, *supra* note 76, at 2241 ("Court interpretations . . . rendered the device virtually dormant . . . until its recent revitalization by the Supreme Court."); William **O.** Bertelsman, *Significant Developments in The Law of Summary Judgments,* 51 KY. BENCH & B. 19, 20 (Winter 1987) (federal courts had been "parsimonious" in granting and affirming summary judgments); SINCLAIR, *supra* note 38 § 8.14, at 436 ("confusion and, in some courts, hostility toward the use of summary judgment motions."); FRIEDENTHAL, *supra* note 11 § 9.1, at 435 n.16 (empirical data indicates that the number of cases dismissed on a motion for summary judgment was relatively small); *see also* Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatkis, 799 F.2d 218, 222 (5th Cir. 1986) ("Trial court reluctance to grant summary judgment has been increased by frequent appellate reversals.").

[80] Steven **A.** Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court,* 116 F.R.D. 183 (1987).

[81] *Id.* at 183 (citing Hutchinson v. Proxmire, 443 US. 111, 120 n.9 (1979)). The state-of-mind issue in *Hutchinson* involved the actual malice requirement in public-figure defamation suits. The Supreme Court opined that "proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *Hutchinson,* 443 U.S. at 120 n.9.

Whildress, *supra* note 80, at 183; *see* Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1970) ("slightest doubt;" reversing grant of summary judgment); Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) ("slightest doubt"); Doehler Metal Furniture Co v. United States, 149 F.2d 130, 135 (2d Cir. 1945) ("litigant has a right to trial where there is the slightest doubt as to the facts . . . ."). Periodically, other courts applied a similarly strict standard. *See* Childress, *supra* note 79, at 183; *see also* United States v. Del Monte de Puerto Rico, Inc., 586 F.2d 870, 872 (1st Cir. 1978); Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 495 (W.D. **Ark.** 1982) (standard followed in United States Court of Appeals for the Eighth Circuit) (citations omitted).

[83] Childress, *supra* note 80, at 183.

[84] Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 & n.5 (6th Cir. 1989) (citations omitted); TRW Financial Sys., Inc. v. UNISYS Corp., 835 F. Supp. 994, 1002

change in summary judgment practice.[85] The three decisions — Matsushita Electric Industrial Co. *v.* Zenith Radio Corp.,[86] Celotex Corp. *u. Catrett,*[87] and Anderson *u.* Liberty Lobby, *Inc.*,[88] departed from prior summary judgment precedent and signaled a turn toward greater approval of summary judgment dispositions.[89] As an illustration of this change in judicial attitude, the Second Circuit immediately reversed its prior stance toward summary judgment, noting:

> It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time . . . .[90]

1. Matsushita — The Nonmouant's Burden — In Matsushita

(E.D. Mich. 1993) ("ushered in a 'new era'"); Security Serv. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("well recognized that these cases brought about a 'new era' in summary judgment practice."); Sheldon Co. Profit Sharing Plan and Trust v. Smith, 828 F. Supp. 1262, 1269 (W.D. Mich. 1993) ("the federal courts have entered a 'new era' in summary judgment practice."); *see also* Childress, *supra* note 80, at 194 ("signals a new era for summary judgments").

[85] Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 OHIO ST. L. J. 95, 99 (1988) ("effected major changes in summary judgment doctrine and practice"); *see also* Security Sys. v. Ed Swierkos Enter., 829 F. Supp. 911, 913 (S.D. Ohio 1993) ("three decisions which gave new life to Rule *56* as a mechanism for weeding out certain claims at the summary judgment").

[86] 475 U.S. 574 (1986).

[87] 477 U.S. 325 (1986).

[88] 477 U.S. 242 (1986).

[89] Friedenthal, *supra* note 21, at 771 & n.12; *see also* Douglas A. Blaze, *Presumed Friuolous: Application of Stringent Pleading Requirements in Civil Rights Litigation,* 31 WM. & MARY L. REV. 935, 980 (1990) ("the Supreme Court recently has demonstrated significant enthusiasm for increasing the role of summary judgment in the litigation process"); Carrington, *supra* note 20, at 2093 ("revived summary judgment as a tool for dealing with the problem of unfounded contentions"); Bertelsman, *supra* note 79, at 19 ("should greatly encourage the use of summary judgments as an effective device to dispose of unmeritorious litigation"); Childress, *supra* note 80, at 194 ("recent Supreme Court cases likely require that summary judgment be more readily granted, and at the least they encourage it in certain circumstances."); *cf.* Weinstein, *supra* note 73, at 1914 ("Supreme Court's recent trilogy of cases . . . will add to the difficulties plaintiffs face in getting to trial. The decisions essentially allow a defendant to require the plaintiff quickly to assemble and present its case at great expense in order to survive a motion for summary judgment.").

[90] Carrington, *supra* note 20, at 2093 (citing Knight v. United States Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied,* 480 U.S. 932 (1987)). However, recent Second Circuit opinions suggest a renewed bias against summary judgment. *See* Gallo v. Prudential Residential Serv., 22 F.3d 1219, 1223 (2d Cir. 1994) ("Considering how often we must reverse a grant of summary judgment . . . .").

Electric Industrial Co. v. Zenith Radio *Corp.*,[91] several American corporations that manufactured and sold consumer electronic products (CEP), primarily television sets, brought suit against a number of Japanese companies. Plaintiffs alleged that the Japanese manufacturers had illegally conspired to drive American companies from the CEP market by maintaining artificially low prices for Japanese goods sold in the United States while simultaneously causing prices for American goods sold in Japan to be fixed at an artificially high price.[92] Plaintiffs argued that the defendants were able to sustain below-cost sales of Japanese products in the United States consumer markets through profits obtained in the controlled Japanese markets.[93] The defendants acted with the full cooperation and support of the Japanese government.[94]

After years of discovery and pretrial proceedings, the district court held that much of the plaintiffs' evidence offered in opposition to defendants' motion for summary judgment was inadmissible and granted summary judgment, opining that the admissible evidence did not raise a genuine issue of material fact as to the existence of the conspiracy.[95] The United States Court of Appeals for the Third Circuit (Third Circuit) reversed, determining that much of the excluded evidence was admissible; and holding that in light of all the evidence a reasonable factfinder could find that a Japanese conspiracy to drive out American competitors existed.[96]

The Supreme Court granted certiorari[97] to determine whether the American manufacturers—the nonmovants—had adduced sufficient evidence in support of their predatory pricing conspiracy theory to survive summary judgment.[98] The Court held that to survive a properly supported motion for summary judgment, the nonmovant "must come forward 'with specific facts showing that there is a genuine issue for *trial.*'"[99] To meet this burden, the nonmovant must do more than raise a "metaphysical doubt as to the material facts;"[100] the nonmovant must establish that the record taken as a whole could support a finding by "a rational trier of fact" in favor of the

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[91] 475 **U.S.** 574 (1986).
[92] *Id.* at 577-78.
[93] *Id.* at 580-81.
[94] *Id.*
[95] *Id.* at 578-79.
[96] *Id.* at 580-81.
[97] 471 U.S. 1002 (1985).
[98] *Matsushita,* 475 **U.S.** at 585.
[99] *Id.* at 587.
[100] *Id.* at 586.

nonmoving party.[101] The Court concluded that the American manufacturers failed to meet their burden and reversed the Third Circuit's decision.[102]

Significantly, the Court permitted district courts to weigh the persuasiveness of the nonmovant's evidence presented in opposition to a motion for summary judgment.[103] If the factual context renders the nonmovant's claim or defense implausible, that party "must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[104] The Court confirmed the judicial authority to review the quality of evidence presented at a motion for summary judgment, remanding the case to the Third Circuit with the order to determine if any other unambiguous evidence existed to permit a trier of fact to find a predatory price conspiracy.[105]

Additionally, the Court diluted the preferential inference that the nonmovant was entitled to draw from the underlying facts. Although acknowledging that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party,[106] the Court limited this principle, opining that the substantive law of the case may limit the permissible inferences to be drawn from ambiguous evidence.[107] Further, facts that are equally consistent with both parties' theory

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[101] *Id.* at 587. This comment illustrates that the Supreme Court views summary judgment as a pretrial analogue to a motion for a directed verdict. John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* **4** LAB. LAW. 747, 764 (1988).

[102] *Matsushita*, 475 U.S. at 598.

[103] Jansonius, *supra* note 101, at 764-65; *see also* Stempel, *supra* note 85, at 111 ("The majority did . . . signal a changed perspective on the degree to which rule 56 permits a court to eliminate a claim because of the judge's view of human motivation.").

[104] *Matsushita*, 475 U.S. at 587.

[105] Jansonius, *supra* note 101, at 765 (citing *Matsushita,* 475 U.S. at 597).

[106] *Matsushita,* 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

[107] *Id.* at *588*. One legal commentator has opined that the Court may have replaced "the usual rule that a plaintiff is entitled to have all reasonable inferences drawn in her favor with a much stricter standard—one which looks, not at the outer limits of plausibility, but rather at the point of equipoise between the two competing hypotheses." Daniel P. Collins, SUMMARY JUDGMENT AND CIRCUMSTANTIAL EVIDENCE, 40 STAN. L. REV. 491, 497-98 (1988). However, this commentator criticized such a broad reading of the Court's opinion because it directly contradicts the traditional summary judgment rule that once the judge determines the inference to be reasonable, he or she may not choose among or weigh the alternatives, and is inconsistent with prior Supreme Court precedent. *Id.* at 501-02.

of the case do not, standing alone, support an inference favoring the nonmovant's position.[108]

2. Celotex—Burdens of Proof—Three months after deciding Matsushita, the Supreme Court used Celotex Corp. *v.* Catrett to elaborate on the parties' respective burdens of proof in a motion for summary judgment. In Celotex, Ms. Catrett filed a wrongful death suit against several asbestos manufacturers, alleging that her husband's death was caused by exposure to asbestos manufactured or distributed by the defendants.[109] After a period of discovery, the Celotex Corporation moved for summary judgment, asserting that Catrett was unable to produce evidence supporting her claim that the decedent had been exposed to Celotex's asbestos products.[110] The district court granted the motion; however, the circuit court reversed, holding that Celotex's failure to produce evidence negating Catrett's claims precluded summary judgment.[111]

The Supreme Court granted certiorari[112] and reversed, holding that summary judgment was proper.[113] Writing for the majority, Justice Rehnquist explained that the moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact.[114] However, FRCP 56 does not require that the moving party support its motion with evidence negating the nonmoving party's claim.[115] Regardless of the moving party's failure to support a motion with affidavits or other evidence, the court should grant summary judgment "so long as whatever is before the district court" satisfies the requirements of FRCP 56.[116]

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[108] *Matsushita,* 475 U.S. at 588; *cf.* Jansonius, *supra* note 101, at 765 (the Court confirmed the district court's authority to evaluate competing inferences from the evidence). Summary judgment should be denied only when a reasonable jury could choose between inferences. Arguably, when there are two equally plausible inferences, no inference at all exists and summary judgment should be granted to the party that does not bear the burden of proof at trial. Friedenthal, ***supra*** note 21, at 785-86. This argument is consistent with the language in *Matsushita* in which the Court stated that if the parties' explanations were equally plausible no inference of conspiracy could be drawn. *Id.*

[109] 477 U.S. 317, 319 (1986).

[110] *Id.* at 319.

[111] *Id.*

[112] 474 U.S. 944 (1985).

[113] *Celotex,* 477 U.S. at 317.

[114] *Id.* at **323.**

[115] *Id.* ("we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.").

[116] *Id.*

When the burden of proof at trial is on the nonmoving party, the moving party's initial burden is not onerous. The moving party may discharge its initial burden by "'showing'—thatis, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[117] In other words, the moving party could challenge the opposing party to "'put up or shut up' on a critical issue."[118]

Once the moving party has satisfied its burden, the nonmoving party cannot rest on its pleadings, but must produce affidavits, depositions, answers to interrogatories, admissions, or other evidence to "designate 'specific facts showing that there is a genuine issue for trial.'"[119] If the nonmovant did not "put up" by designating such facts, then summary judgment is proper.[120] Evidence produced in opposition to the motion need not be in a form admissible at trial, but it should be of those types listed in FRCP 56(c).[121]

Although Catrett was a five-to-four decision, all nine justices generally agreed with the majority opinion's articulation of the respective burdens borne by the parties for summary judgment.[122] Justice White's concurring opinion distanced itself from the majority only to the extent that it seemed to indicate that the moving party could satisfy its burden "without supporting the motion in any way or with a conclusionary assertion that the plaintiff has no evidence to prove his case."[123] Three of the dissenters did not criticize the majority's statement of summary judgment law; they merely criticized its application to the particular facts of the case.[124] The remaining dissenter, Justice Stevens, believed that the Court should have affirmed the circuit court's decision on the "narrow ground" of a district court venue error.[125]

3. Anderson—Evidentiary Standards—In Anderson *v.* Liberty Lobby, *Inc.*,[126] the Court took the opportunity to explain the evidentiary standard that the district court must apply when considering a summary judgment motion. Significantly, the Court held that the

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[117]*Id.* at 325.

[118]Bertelsman, *supra* note 79, at 20; *see also* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989) ("putup or shut up").

[119]*Celotex*, 477 U.S. at 324.

[120]*Bertelsman, supra* note 79, at 20; *Street*, 886 F.2d at 1478.

"*Welotex*, 477 U.S. at 324 ("opposedby any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . . .").

[122]Stempel, *supra* note 85 at 106; Friedenthal, *supra* note 21, at 777 ("at least eight").

[123]*Celotex,* 477 U.S. at 328 (White, J., concurring).

[124]Stempel, *supra* note 85, at 106.

[125]*Celotex*, 477 U.S. at 339 (Stevens, J., dissenting).

[126]477 U.S. 242 (1986).

trial judge must consider any heightened standard of proof borne by the plaintiff, such as clear and convincing evidence.[127]

Liberty Lobby, a nonprofit organization and "self-described 'citizen's lobby," brought a libel action against columnist Jack Anderson and certain other coworkers in response to several articles in which the defendants characterized members of Liberty Lobby as "neo-Nazi," "anti-Semetic," "racist," and "Facist."[128] Under existing law, the plaintiffs, as public figures, could not recover unless they could prove by clear and convincing evidence that the defendants acted with actual malice.[129]

Under prevailing precedents, the district court should have denied a motion for summary judgment; the record was voluminous, the issues were complex and several issues involved the defendants' state of mind.[130] Nevertheless, the district court granted the defendants' motion for summary judgment, holding that the plaintiffs were unable to establish actual malice.[131]

On appeal, the circuit court reversed, holding that for purposes of summary judgment the plaintiffs only were required to prove their case by a preponderance, rather than by clear and convincing evidence.[132] The circuit court believed that "to impose the greater evidentiary burden at summary judgment 'would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiffs case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.'"[133] The circuit court held that the district court had improperly granted summary judgment because " 'a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice.'"[134]

The specific issue before the Supreme Court was whether the circuit court had erred by failing to consider the plaintiffs' heightened evidentiary burden for proof of actual malice, at the summary

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[127]Collins, supra note 107, at 492-93.

[128]*Liberty* Lobby, 477 U.S. at 244-45.

[129]*Id.* (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

[130]Bertelsman, supra note 79, at 19.

[131]*Liberty* Lobby, 477 U.S. at 246. The defendants submitted the affidavit of Charles Bermant, author of two of the contested articles. In his affidavit, Bermant described his efforts researching and writing the articles, and stated that he still believed the factual accuracy of his articles. *Id.* at 245. The remaining article, written by Anderson, was based on information obtained exclusively from Bermant. *Id.* at 245 n.2.

[132]*Id.* at 247.

[133]*Id.* (citing Liberty Lobby, Inc., v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984)).

[134]*Id.*

judgment stage.[135] The Court began its analysis with the language of FRCP 56, which requires there be "no *genuine* issue of *material* fact."[136] The Court believed this standard provided "that the mere existence of *some* alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment;" the dispute must be "genuine" and the disputed facts "material."[137]

The Court stated that the substantive law of the case will determine which facts are material.[138] Only those disputed facts that may affect the outcome of the case under the governing law will preclude the entry of summary judgment; "irrelevant or unnecessary [factual disputes] will not be counted."[139]

The dispute over these material facts must be genuine — that is, the evidence must be such that a reasonable trier of fact could return a verdict for the nonmoving party.[140] Accordingly, the nonmoving party may not rest on the allegations or denials of its pleadings, but must present "significantly probative" evidence to support its complaint.[141] If the evidence presented is "merely colorable" or is not significantly probative, the court may grant summary judgment.[142] The existence of a mere "scintilla of evidence" will not satisfy the nonmovant's burden.[143]

The Court acknowledged that its interpretation of the summary judgment standard mirrored the standard for a directed verdict under FRCP 50(a).[144] If, under the applicable law, reasonable minds would not differ as to the import of the evidence and the resultant verdict, the trial judge must direct a verdict.[145] Accordingly, summary judgment may be viewed as an early motion for a directed verdict.[146]

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[135] *Id.*

[136] *Id.* at 248.

[137] *Id.* at 247-48.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 248-50, 256-57.

[142] *Id.* at 249-50. Under prior precedent, district court judges denied summary judgment when colorable evidence existed or probity had to be evaluated. Childress. *supra* note 80, at 190.

[143] *Liberty Lobby*, 477 U.S. at *252*.

[144] *Id.* at 250.

[145] *Id.*

[146] D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, **54** BROOK. L. REV. 35, 37 (1988). Like a normal directed verdict motion, the trial judge must "struggle with the difficulties and indeterminacies represented by the sufficiency of the evidence test." *Id.* at 37-38. That test states "'could a reasonable jury find to the appropriate standard of proof the facts upon which the [party] bears the burden of producing evidence . . . .'" *Id.* at *38* n.17; *see also* Collins, *supra* note 107, at 491 ("standard mirrors that applied in deciding a motion for a directed verdict, namely 'whether the evidence presents a sufficient disagreement to require submission to a jury.'").

Significantly, the Court also held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."[147] When determining whether a genuine issue of material fact exists, the trial judge must consider "the actual quantum and quality of proof necessary to support liability" under the substantive law.[148] When, as in *Liberty Lobby,* the nonmoving party must meet a higher evidentiary burden at trial—such as proving an issue by clear and convincing evidence—that party must meet the same burden in resisting summary judgment.[149] Consequently, the appropriate summary judgment inquiry in *Liberty Lobby* was whether the evidence could support a reasonable jury finding that the plaintiff had established actual malice by clear and convincing evidence.[150] Because the circuit court had not reviewed the district court's grant of summary judgment through the prism of clear and convincing evidence, the Court vacated the circuit court's decision and remanded for reconsideration.[151]

Notably, the Court neither limited this qualitative review to defamation cases nor limited its holding, that the applicable evidentiary burden be incorporated into the summary judgment determination, to higher standards.[152] Further, in the wake of *Matsushita,* the Court's opinion in *Anderson* arguably adds the proposition that, when judging the relative plausibility of competing inferences, "the critical point of relative plausibility varies as a function of the standard of proof."[153] Accordingly, in deciding a motion for summary judgment, the trial judge must consider both who has the burden of proof at trial and the nature of that burden. The nonmovant no longer may rely on its traditional entitlement to reasonable inferences from facts within the record to survive a motion for summary judgment.

4. *Summary: Supreme Court Clarification and Liberalization of Rule* 56—Focusing on questions of constitutional import, the Supreme Court rarely writes extensively about a federal rule of civil procedure.[154] That the Supreme Court elected to hear, decide, and write thorough and far-reaching opinions in three cases in one term about a single rule of civil procedure signaled a significant change

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[147]*Liberty* Lobby, **477** U.S. at 254.
[148]*Id.*
[149]*Id.* at 253-55; see *also* Bertelsman, *supra* note 79, at 19.
[150]*Liberty* Lobby, **477** U.S. at 255-56.
[151]*Id.* at 257.
[152]Childress, *supra* note 80, at 190.
[153]Collins, *supra* note 107, at 514.
[154]Stempel, *supra* note 85, at 100.

in judicial attitude toward the summary judgment device.[155] Significantly, in all three cases, the Supreme Court overturned circuit court reversals of summary judgment awards by district courts.

As one legal commentator noted, "the majority opinions read like an ode to the wonders of summary judgment."[156] The Court's message has been to disregard previous dictum solicitous of nonmovants; trial courts should start aggressively granting summary judgment motions when appropriate.[157]

As Justice Rehnquist wrote in *Celotex*, summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "'to secure the just, speedy and inexpensive determination of every action.'"[158] Courts must construe FRCP 56 "with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate . . . prior to trial, that the claims and defenses have no factual basis."[159] Indeed, the last two sentences of FRCP 56(e) were "designed to *facilitate* the granting of motions for summary judgment . . . ."[160]

The language contained in the Supreme Court trilogy of cases changed the tone of the Court's perspective on summary judgment motions, signaling to lower courts that they should not be unduly cautious in granting these motions.[161] The Court's rhetoric in these three decisions created an environment conducive to greater use and granting of the motion.[162] The Supreme Court sought to encourage courts to interpret FRCP *56* in such a manner that allows the trial court to isolate and dispose of factually unsupported claims

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[155] *Id.*

[156] *Id.* at 106.

[157] *Id.* at 107; *cf.* James V. Chin, Clark v. Coats & Clark, Inc.: *The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment* 26 GA. L. REV. 1009 (1992) ("As a result of *Celotex*, summary judgment was more readily available than before.").

[158] Celotex Corp. v. Catrett, 477 U.S. 321, 327 (1986).

[159] *Id.*

[160] *Id.* at 325-26.

[161] Stempel, *supra* note 85, at 99; Lawrence W. Pierce, *Summary Judgment:* **A** *Favored Means of Summarily Resolving Disputes,* 53 BROOK. L. REV. 279, 286 (1987) ("encourage broader use of summary judgment"); Childress, *supra* note 80, at 193 ("signal by the Court that pretrial practice must become more liberal — that trial courts should not be reluctant to grant summary judgments where appropriate."); ***see*** *also* Sheldon Co. Profit Sharing Plan and Trust v. Smith, 828 F. Supp. 1262, 1269 (W.D. Mich. 1993) ("In recent years, the Supreme Court has encouraged the use of summary judgment where appropriate to ensure just, speedy, and efficient determinations in each case.").

[162] Stempel, *supra* note 85, at 99.

and defenses without fear of overzealous second-guessing at the appellate court level.[163]

After the Supreme Court's trilogy of cases, summary judgment law generally favors the defendant, particularly if the defendant is the movant and does not bear the heavier burden at trial.[164] The trilogy permits the moving party to challenge the opposing party's evidence prior to trial. In other words, the moving party may challenge the nonmoving party to "put up or shut up."[165] If the nonmoving party fails to establish a genuine issue of material fact for trial, it forfeits its right to a trial on the merits.

IV. Summary Judgment: The Current State of the Law

A. *The Movant's Burden*

For purposes of summary judgment, the law governing burdens of proof at trial determine the relative burdens of the parties to obtain or survive summary judgment.[166] The moving party always bears the initial burden of establishing that no genuine issues of material fact exist necessitating a trial on the merits.[167]

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[163] *Celotex*, 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."); *see* Harris v. Roberts, 817 F. Supp. 895 (D. Kan. 1993) (interpreting Rule 56 in such a way as to permit the court to isolate and dispose of factually unsupported claims or defenses); Stempel, *supra* note 85, at 107 (The Court's message has been: " 'If trial courts start aggressively granting summary judgment, we are reluctant to second-guess them as might less-enlightened circuit panels.' ").

[164] *See* Childress, *supra* note 80, at 191 ("favors parties bringing a summary judgment motion"); Risinger, *supra* note 146, at 39 ("grossly favoring defendants over plaintiffs no matter which party is the movant"); Friedenthal, *supra* note 21, at 779 ("from a strictly theoretical point of view a party who moves for summary judgment, unless he or she must bear the burden of proof at trial, should need to do no more than demand that the opposing party establish that it can meet its burden of production if the case is permitted to go to trial"); *see also* TRW Financial Sys., Inc., v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) ("lowered the movant's burden on a summary judgment motion").

[165] Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

[166] *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting); Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Anderson v. Radison Hotel Corp., 834 F. Supp. 1364, 1367 (S.D. Ga. 1993); Barefoot v. Mid-America Dairymen, Inc., 826 F. Supp. 1046, 1048 (N.D. Tex. 1993).

[167] *Celotex*, 477 U.S. at 323; *Lavespere*, 910 F.2d at 178; Clark v. Sears, Roebuck & Co., 827 F. Supp. 1216, 1218 (E.D. Pa. 1993); *see also* **York** Excavating Co. v. Employers Insur. of Wausau, 834 F. Supp. 733, 738 (M.D. Pa. 1993) ("moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact"); Ross v. Jolly, 151 F.R.D. 562, 566 (E.D. Pa. 1993) (always bears the initial responsibility). If the moving party satisfies this burden, the burden of production then shifts to the nonmoving party; however, the ultimate burden of persuasion remains with the moving party. Gary T. Foremaster, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731, 735.

If the moving party bears the burden of proof at trial, it must submit evidence affirmatively establishing all the essential elements of its case such that no reasonable jury could find for the opposing party.[168] Further, it may need to negate the existence of some material element of the nonmoving party's claim or defense.[169] However, if the nonmoving party bears the burden of proof at trial, the movant may satisfy its summary judgment burden merely by pointing out that the nonmovant cannot establish an essential element of its case.[170]

Although the Supreme Court stated that, when a moving party does not bear the burden of proof at trial, it may satisfy its burden by "'showing'—thatis pointing out to the district court — that there is an absence of evidence supporting the nonmoving party's case,"[171] the moving party may not satisfy its burden merely by filing an unsupported motion or by filing a declaration that the nonmoving party lacks sufficient evidence to prove the case.[172] **As** a minimum, the movant must inform the district court of the basis of its motion and identify those portions of the record that establish the absence of a genuine issue of material fact.[173]

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[168]United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991) (en banc); Bob Hamric Chevrolet, Inc. v. United States I.R.S., 849 F. Supp. 500, 507 (W.D. Tex. 1994); *Anderson,* 834 F. Supp. at 1367; *see also* Foremaster, *supra* note 167, at 736.

[169]*Lavespere,* 910 F.2d at 178; ***see*** Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 190 (5th Cir. 1991); Chin, *supra* note 157, at 1017 (view that moving party—which bears the burden of proof at trial—must negate an essential element of the nonmoving party's claim, remains valid).

[170]*Lavespere*, 910 F.2d at 178; ***see*** *also* Hammer v. Slater, 20 F.3d 1137, 1141 (11th Cir. 1994); Elkins v. Richardson-Merrill, Inc., 8 F.3d 1068, 1071 (6th Cir. 1993); *Duplantis,* 948 F.2d at 190; *Bob Hamric Chevrolet, Inc.,* 849 F. Supp. at 507; Allen v. Pennco Engineering Co., 847 F. Supp. 1315, 1320-21 (M.D. La. 1994); Humphreys v. General Motors Corp., 839 F. Supp. 822, 825 (N.D. Fla. 1993); *Anderson,* 834 F. Supp. at 1367; Hebein v. Ireco, Inc., 827 F. Supp. 1326, 1329 (W.D. Mich. 1993); Accent Designs, Inc. v. Jan Jewelry Designs, Inc., 827 F. Supp. 957, 964 (S.D.N.Y. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992); Chin, *supra* note 157, at 1017 ("ifthe non-moving party has the burden of proof on an issue at trial, the moving party can satisfy its initial burden by showing the absence of evidence to support the non-moving party's case"). The moving party is not required to negate an element of the nonmovant's claim. *See Duplantis,* 948 F.2d at 190; *Allen,* 847 F. Supp. at 1321; ACCU Personnel Inc. v. ACCU STAFF Inc., 846 F. Supp. 1191, 1203 (D. Del. 1994).

[171]Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

[172]Sink, *supra* note 78, at 1923 n.92; *see also Duplantis,* 948 F.2d at 190 (simply filing a motion is not enough); Russ v. Int'l Paper Co., 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 1675 (1992) (simply filing a motion is not enough); United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) ("never enough simply to state that the non-moving party cannot meet its burden at trial . . . the moving party must point to specific portions of the record . . . ."); *Anderson,* 834 F. Supp. at 1367 ("merely *stating* that the non-moving party cannot meet its burden at trial is *not* sufficient").

[173]*Celotex,* **477** U.S. at 323.

In his concurring opinion in *Celotex,* Justice White clarified the Court's opinion, writing: "[I]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[174] The moving party still must discharge the burden that **FRCP *56*** places on it.[175]

B. Surviving the Motion: The Nonmovant's Burden

If the moving party carries its initial burden of presenting the court with a properly supported motion for summary judgment, then the nonmoving party " 'must set forth specific facts showing that there is a genuine issue for trial.' "[176] However, this burden shifts to the nonmovant "[i]f — and *only* if — the moving party carries the initial burden . . . ."[177] The quantum of evidence required to survive summary judgment will depend on the nonmovant's burden at trial.[178]

When the nonmoving party bears the burden of proof at trial, summary judgment is appropriate if the nonmovant cannot " 'make a showing sufficient to establish the existence of an element essential to [its] case.' "[179] The nonmovant must make a sufficient showing on *every* essential element of the case for which it bears the burden of proof at trial.[180] When the nonmoving party completely fails to prove an essential element of the its case, all other facts are ren-

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[174]*Id.* at 328 (White, J., concurring).

[175]*Id.*

[176]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)(citation omitted).

[177]Anderson v. Radisson Hotel Corp., 834 F. Supp. 1364, 1367 (S.D. Ga. 1993); ***see*** *also* Russ v. Int'l Paper Co., 943 F.2d 589, 591 (5th Cir. 1991), ***cert. denied,*** 112 S. Ct. 1675 (1992) ("the party opposing a motion for summary judgment must respond only after the moving party meets its initial burden"); Chevalier **v.** Animal Rehabilitation Ctr., Inc., 839 F. Supp. 1224, 1231(N.D. Tex. 1993)("nonmovantis not required to respond to the motion until the movant properly supports his motion with competent evidence");Foremaster, *supra* note 167, at 749 ("party opposing summary judgment need not respond unless and until the movant has satisfied the burden imposed on him by Rule 56(c)").

[178]SINCLAIR, *supra* note 38, § 8.14, at 437 ("quantum of evidence that a nonmoving party must produce in order to avoid an adverse judgment will vary in accordance with the magnitude of the evidentiary standard of proof that will apply at the trial on the merits").

[179]Nebraska v. Wyoming, 113 S. Ct. 1689, 1694 (1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)); ***see*** *also* Lewis v. Gillette Co., 22 F.3d 22, 24 (1st Cir. 1994); Marrero Garcia v. Irizarry, 829 F. Supp. 523, 527 (D. P.R. 1993) ("must present definite, competent evidence to rebut the motion").

[180]Reich v. Conagra, Inc., 987 F.2d 1357, 1359 (8th Cir. 1993) (emphasis added); ***see*** *also* Clark v. Sears, Roebuck & Co., 827 F. Supp. 1216, 1218 (E.D. Pa. 1993).

dered immaterial.[181] This burden is not satisfied by the nonmovant's assurances that it will develop further facts later or at trial.[182] Furthermore, the "mere existence of a scintilla of evidence" in support of the nonmoving part's position is insufficient to prevent summary judgment.[183]

If the nonmoving party does not bear the burden of proof at trial, it must respond to the moving party's affirmative evidence, which presumably has established its entitlement to summary judgment on every essential element of its case. The nonmoving party will not survive summary judgment unless "in response, [it]'come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'"[184] This evidence does not necessarily have to be new and different evidence from that presented by the movant; it may be material already on file with the court.[185] If the nonmovant points to evidence in the record that the movant had used to support its motion for summary judgment, the nonmovant has satisfied its obligation to "go beyond the pleadings . . . [to] designate specific facts showing that there is a genuine issue for trial."[186]

The evidentiary burden on a nonmoving party in a motion for summary judgment is greater than in a motion to dismiss.[187] The law requires more from the nonmovant to survive a motion for summary judgment than presenting a complaint that states a claim on which relief may be granted.[188]

The nonmoving party may not escape summary judgment by relying solely on the court drawing all inferences in its favor. While acknowledging the traditional inferences afforded to the nonmoving party, many courts are limiting those inferences. The inferences

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[181]Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986);Resolution Trust Corp. v. Holmes, 839 F. Supp. 449, 451 (S.D. Tex. 1993); Heredia v. Johnson, 827 F. Supp. 1522, 1524(D. Nev. 1993).

[182]Christenson v. Saint Mary's Hosp., 835 F. Supp. 498, 501 (D. Minn. 1993); Michigan State Podiatry Ass'n. v. Blue Cross and Blue Shield of Michigan, 681 F. Supp. 1239,1241(E.D. Mich. 1987).

[183]Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

[184]United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438(11th Cir. 1991) (en banc) (citations omitted).

[185]Isquith v. Middle S. Util., Inc., 847 F.2d 186, 198-99 (5th Cir.), *cert. denied,* 488 U.S. 926 (1988); *see also* Foremaster, *supra* note 167, at 749 ("draw[ing] the court's attention to relevant evidence in the record that the movant may have overlooked or disregarded"); *accord Celotex Corp.,* 477 U.S. at 332 (Brennan J., dissenting) ("calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party").

[186]*Isquith,* 847 F.2d at 198-99 (citing *Celotex,* 477 U.S. at 334).

[187]Krim v. Branctexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir. 1993) (citing Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991)).

[188]*Id.*

must be "reasonable" ones.[189] The nonmovant may receive the benefit of inferences only if they are "justifiable inferences from the evidence."[190]

As *Matsushita* and *Liberty Lobby* indicate, a district court may examine the nonmovant's evidence for both its evidentiary sufficiency and its qualitative import,—that is, its "implausibility."[191] When the factual context of the case makes the nonmovant's claim or defense implausible, that party must come forward with more persuasive evidence to survive summary judgment than ordinarily would be required.[192]

In addition to drawing all reasonable inferences in the nonmoving party's favor, the court must view the evidence in the light most favorable to that party.[193] Because credibility determinations are not appropriate at the summary judgment stage, the court must accept the nonmovant's evidence as true for purposes of the motion.[194]

There are limits to the nonmovant's ability to raise a genuine issue of material fact through the submission of contradictory evidence. Evidence that is merely colorable or not significantly probative will not forestall summary judgment.[195] A district court must

[189]Eastman Kodak Co. v. Image Technical Serv., 112 S. Ct. 2072, 2083 (1992).

[190]Maryland Comm. Against the Gun Ban v. Simms, 835 F. Supp. 854, 860 (D. Md. 1993); *cf.* M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1992) (inferences must be reasonable in light of competing inferences); Pehr v. University of Chicago, 799 F. Supp. 862, 864 n.1 (N.D. Ill. 1992) (only required to draw "reasonable" inferences in nonmovant's favor).

[191]Childress, supra note 80, at 192; see *also* Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) (" 'trial court has at least some discretion to determine whether the respondent's claim is implausible' ") (citation omitted); TRW Financial Sys., Inc. v. UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) (same).

[192]FDIC v. F.S.S.S., 829 F. Supp. 317, 321 (D. Alaska 1993); see also Knight v. Sharif, 875 F.2d 516, 523 (5th Cir. 1989); Cal. Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987); Courtaulds Aerospace, Inc. v. Huffman, 826 F. Supp. 345, 349 (E.D. Cal. 1993) ("The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment."); Somavia v. Las Vegas Metro. Police Dep't, 816 F. Supp. 638, 640 (D. Nev. 1993); Mossman v. Transamerica Ins. Co., 816 F. Supp. 633, 635 (D. Hi. 1993); Jacobsonv. Cohen, 151 F.R.D. 526, 528 (S.D.N.Y. 1993).

[193]Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); Baker v. Detroit Riverview Hosp., 834 F. Supp. 216, 219 (E.D. Mich. 1993); Independent Drug Wholesalers Group, Inc. v. Denton, 833 F. Supp. 1507, 1514 (D. Kan. 1993); Kuper v. Quantum Chem. Corp., 829 F. Supp. 918, 920 (S.D. Ohio 1993).

[194]William W. Schwarzer et al., *The* Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 479 (1991).

[195]*Liberty* Lobby, 477 U.S. at 249; M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 163 (4th Cir. 1992); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3d Cir. 1988); National Acceptance Co. of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1316 (E.D. Wis. 1993); *Kuper,* 829 F. Supp. at 920; Standard

resolve factual issues of controversy in the nonmovant's favor only "where the facts specifically averred by that party contradict facts specifically averred by the movant . . . ."[196] Further, a nonmoving party does not generally create a genuine issue of material fact by submitting an affidavit that contradicts previous deposition testimony[197] or that merely contains conclusory allegations.[198]

Similarly, legal memoranda will not create an issue of fact capable of defeating an otherwise proper motion for summary judgment.[199] Nor may the nonmovant survive summary judgment simply by attacking the credibility of the movant's affiants without a supporting factual basis.[200]

Even with the benefit of all reasonable inferences and the evidence viewed in the light most favorable to it, the nonmoving party

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Fire Ins. Co. v. Rominger, 827 F. Supp. 1277, 1278 (S.D. Tex. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992).

[196]Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990).

[197]Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991) (general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony"); Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 631 (S.D. Cal. 19931. However, if the inconsistency was the result of confusion, an honest discrepancy, a mistake, or the result of newly discovered evidence, the affidavit may create a *genuine* issue of fact. *Kennedy,* 952 F.2d at 266-67 (discussing case law in other circuits); *see also* Unterreiner v. Volkswagen Of America, Inc., 8 F.3d 1206, 1210 (7th Cir. 1993) ('"party may not create a *genuine* issue of fact by contradicting his own earlier statements, at least without a plausible explanation for the sudden change of heart'"); Schwarzer, *supra* note 194, at 480 ("A party normally will not be able to defeat summary judgment with an affidavit that directly contradicts that party's earlier affidavit or sworn testimony, unless the affidavit is accompanied by a credible explanation for the contradiction.").

[198]*Lujan*, 497 U.S. at 888 (nonmovant may not "replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"); Travelers Ins. Co. v. Liljeberg Enter., Inc., 7 F.3d 1203, 1207 (5th Cir. 1993); Allstate Ins. Co. v. Barnett, 816 F. Supp. 452, 495 (S.D. Ind. 1993); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992). This principle remains true even if the movant "cannot demonstrate contrary facts by specific affidavit recitation to rebut the conclusory affidavit." *Travelers Ins.* Co., 7 F.3d at 1207.

[199]L.S.T., Inc. v. Crow, 834 F. Supp. 1355, 1361 (M.D. Fla. 1993); *see also* Nieves v. University of Puerto Rico, 7 F.3d 270, 276 n.9 (1st Cir. 1993) ("Factualassertions by counsel in motion papers. memoranda, briefs, or other such 'self-serving' documents, are generally insufficient to establish the existence of a genuine issue of material fact at summary judgment."); British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979) (legal memoranda and oral argument insufficient); Lamontagne v. E. I. Du Pont De Nemours and Co., 834 F. Supp. 576, *580* (D. Conn. 1993) (mere conclusionary allegations or denials in legal memoranda and oral argument are not evidence); Mossman v. Transamerica Ins. Co., 816 F. Supp. 633, 635 (D. Hi. 19931 ("legalmemoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment"); *cf.* Osborn v. Bell Helicopter Textron, Inc., 828 F. Supp. 446, 448 (N.D. Tex. 1993) ("mustproduce evidence, not merely argument. . . .").

[200]Schwarzer, *supra* note 194, at 479.

must do more than present minimal evidence on the issue that it asserts is disputed.[201] Indeed, after *Liberty Lobby,* the nonmovant may not merely produce "specific facts" establishing some foundation for its claim; the nonmovant must produce enough facts to allow a reasonable jury to return a verdict in its favor.[202]

Although the nonmovant's failure to oppose summary judgment waives the right to contradict any facts asserted by the movant,[203] the failure to respond to a motion for summary judgment does not automatically entitle the moving party to judgment.[204] Because FRCP *56* provides for summary judgment only "if appropriate," the court must determine entitlement to summary judgment based on the parties' submissions.[205] Accordingly, where the evidentiary record does not establish the absence of a genuine

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[201] Carroll Touch, Inc. v. Electro Mechanical Sys., Inc., 3 F.3d 404, 413 (Fed. Cir. 1993).

[202] SINCWR, *supra* note 38, § 8.14, at 437; *see also Carroll Touch,* 3 F.3d at 413; Hebein v. Ireco, Inc., 827 F. Supp. 1326, 1329 (W.D. Mich. 1993).

[203] Custer v. Pan American Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993); Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993) (admitting that no material issue of fact exists); Eversley v. M Bank Dallas, 843 F.2d 172, 174 (5th Cir. 1988) (treating facts as undisputed); Corretjer Farinacci v. Picayo, 149 F.R.D. 435, 438 (D.P.R. 1993); Lovejoy v. Saldanha, 838 F. Supp. 1120, 1121 n.1 (S.D. W.Va. 1993) (accepting factual allegations as undisputed); Mills v. United States, 805 F. Supp. 448, 449 (E.D. Tex. 1992); *cf.* General Electric Capital Corp. v. Kozil, 149 F.R.D. 149, 153 (N.D. Ill. 1993) (based on local rule, all material facts deemed admitted); Saini v. Bloomsburg Univ. Faculty, 826 F. Supp. 882, 886 (M.D. Pa. 1993) (same).

[204] Schwarzer, *supra* note 194, at 480; *see also* Campbell v. Hewitt, Coleman & Assoc., **21** F.3d 52, *55* (4th Cir. 1994); Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1994) ("district court may not grant a motion for summary judgment simply because the nonmoving party does not file opposing material . . . ."); *Custer,* 12 F.3d at 416 ("moving party must still show that the uncontroverted facts entitle the party to 'a judgment as a matter of law.'") (citation omitted); *Glass,* 2 F.3d at 739; Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993) (cannot award summary judgment as a sanction for failure to oppose a motion for summary judgment); *Corretjer Farinacci,* 149 F.R.D. at 438; *Mills,* 805 F. Supp. at 449. *But cf.* Kelson v. Southern Bell Telephone & Telegraph Co., 778 F. Supp. 521, 523 (S.D. Fla. 1991) ("well within this Court's discretion to grant the summary judgment motion based on the fact that it was unopposed . . . ."). The district court may dismiss the case for failure to prosecute. *Tobey,* 985 F.2d at 332.

[205] Schwarzer, *supra* note 194, at 480; *see also Picayo,* 149 F.R.D. at 438. Some jurisdictions require the court to review the entire record for evidence of a genuine dispute. Schwarzer, *supra* note 194, at 480; *see also Glass,* 2 F.3d at 739 ("under an obligation to look at the entire record . . . ."); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930 (1st Cir. 1983); Keiser v. Coliseum Properties, Inc., 614 F.2d 406, **410** (5th Cir. 1980). However, these same jurisdictions have suggested that in a large and complex case, the district court need not read the entire record before deciding a motion for summary judgment. *Glass,* 2 F.3d at 739 n.4 ("does not mean that the court must examine the entire record where the case is large and complex, become a 'ferret,' or otherwise look for a 'needle in a paper haystack.'") (citation omitted); *Stepanischen,* 722 F.2d at 930 n.2; Higgenbotham **v.** Ochsner Found. Hosp., 607 F.2d 653, 656-67 (5th Cir. 1979) (need not look for a "needle in a paper haystack").

issue of material fact, the court must deny summary judgment even if the nonmoving party has failed to submit opposing evidence.[206]

C. Special Issues

1. Intent and Motivation—Traditionally, courts and commentators have been reluctant in granting summary judgment in cases involving issues of intent or motivation.[207] Indeed, in Poller *v.* Columbia Broadcasting System, *Inc.*,[208] the Supreme Court provided support for this reluctance when the Court cautioned that summary judgment should be "used sparingly in complex anti-trust litigation where motive and intent play leading roles."[209] Accordingly, courts have denied summary judgment in cases involving fraud, labor disputes, denaturalization, mistake, and corporate judgment.[210] The unwillingness to grant summary judgment in cases involving state of mind issues was particularly pronounced in the employment discrimination arena,[211] a hesitancy that continues in some courts.[212]

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[206] *Picayo*, 149 F.R.D. at 438 (citing *Stepanischen,* 722 F.2d at 929; Thornton v. Evans, 692 F.2d 1064, 1075 (7th Cir. 1982)).

[207] *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) ("proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition."); Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied,* 475 U.S. 1048 (1986); Meagher v. Lamb-Weston, 839 F. Supp. 1403, 1413 (D. Or. 1993) (courts are generally cautious about granting summary judgment when motivation and intent are at issue).

[208] 368 U.S. 464 (1962).

[209] *Id.* at 473 (emphasis added); *see* also Jansonius, supra note 101, at 756.

[210] 10A WRIGHT, supra note 11, § 2730, at 248-55 (citations omitted).

[211] Prior to 1986, summary judgment was rarely successful in Title VII and ADEA cases. Jansonius, supra note 101, at 756-57. A survey of published decisions between 1979 and 1985 revealed that circuit courts reversed grants of summary judgment in 59 of 96 decisions, and district court opinions reflected the denial of such motions in 121 out of 180 attempts. *Id.* at 759; *see* also Thornbrough v. Columbus and Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985) ("summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent").

[212] *See* also Gallo v. Prudential Residential Serv., 22 F.3d 1219, 1224 (2d Cir. 1994) ("When deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account."); Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 921 (11th Cir. 1993) ("the grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the 'elusive factual question' of intentional discrimination") (citation omitted); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1038 (7th Cir. 1993) (summary judgment "standard is applied with additional rigor in employment discrimination cases, where intent and credibility are crucial issues"); Hillebrand v. M-Tron Indus., Inc., 827 F.2d 363, 364 (8th Cir. 1987) (summary judgments used sparingly in employment discrimination cases); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1390 (N.D. Ill. 1993) (applied with added vigor). Since 1986, the circuit courts have split on this issue. Jansonius, supra note 101, at 771 ("some circuits *see* a broader role for Rule 56 in employment discrimination litigation and others do not"), The Second, Third, Eighth, Ninth, and Eleventh Circuits have exhibited a reluctance to grant summary judgment in employment discrimination cases. *Id.* at 777.

Fortunately, not all courts have exhibited this attitude. Many courts are more receptive to granting a properly supported motion for summary judgment in cases involving issues of intent,[213] even in employment discrimination cases.[214] Courts have granted summary judgment to defendants in cases involving fraud, conspiracy, and other claims involving state of mind issues when the opposing party was unable to support its allegations sufficiently to create a genuine issue of material fact.[215]

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[213] Roger v. Yellow Freight Sys., Inc., 21 F.3d 146, 148 (7th Cir. 1994) (retaliatory discharge for seeking medical benefits) ("Summary judgment will not be defeated simply because motive or intent are involved."); Krim v. Banctexas Group, Inc., 989 F.2d 1435, 1449 (5th Cir. 1993) (securities fraud); Rhodes v. Ford Motor Credit Co., 951 F.2d 905, 906-907 (8th Cir. 1991) (defamation); Illinois Bell Telephone Co. v. Haines and Co., 905 F.2d 1081, 1087 (7th Cir. 1990) (antitrust case); LeFevre v. Space Communications Co., 771 F.2d 421, 423 (10th Cir. 1985) (intentional interference with employment contract); Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) (insurance entitlement); American Telephone & Telegraph Co. v. New York City Human Resources Administration, 833 F. Supp. 962, 974 (S.D.N.Y. 1993) (telecommunications). *But cf.* Coolspring Stone Supply v. American States Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993) (inappropriate in cases involving state of mind determinations); Christiania General Ins. v. Great American Ins., 979 F.2d 268, 274 (2d Cir. 1992) ("though the construction of a contract is a matter of law, when resort to extrinsic evidence is necessary to shed light on the parties intent summary judgment ordinarily is not an appropriate remedy . . . ."); Wanke v. Lynn's Transp. Co., 836 F. Supp. 587, 600 (N.D. Ill. 1993) ("must be circumspect in approaching summary judgment motions that turn on a party's state of mind . . . ."); Orange Lake Assoc., Inc. v. Kirkpatrick, 825 F. Supp. 1169, 1173 (S.D.N.Y. 1993) ("where a defendant's intent and state of mind are implicated, summary judgment is ordinarily inappropriate.").

[214] *See* Goldman v. First Nat'l Bank Of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (age discrimination: " '[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.' ") (citation omitted); Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993) (discrimination based on Italian origin); Morgan v. Harris Trust and Sav. Bank of Chicago, 867 F.2d 1023, 1026 (7th Cir. 1989) (Title VII: "Summary judgment will not be defeated simply because issues of motive or intent are involved . . . ."); Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988) (sex discrimination: '"[E]ven when such issues of motive and intent are at stake, summary judgment is proper where the plaintiff presents no indication of motive or intent supportive of his position.'") (citation omitted); Solt v. Alpo Petfoods, Inc., 837 F. Supp. 681, 683-84 (E.D. Pa. 1993) ("Although allegations of discrimination which involve an analysis of motive or intent are fact intensive, summary judgment is appropriate where plaintiff has not provided enough evidence to support a reasonable inference of discrimination."); Moore v. Nutrasweet Co., 836 F. Supp. 1387 (N.D. Ill. 1993) (granting summary judgment in Title VII case); Samuelson v. Durkee/French/Airwick, 760 F. Supp. 729, 734-35 (N.D. Ind. 1991) (age and sex discrimination: "Even on the issue of intent, summary judgment is proper if the party with the burden at trial presents no indication of the necessary motive or intent."); *cf.* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) ("The workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led courts to take a critical look at efforts to withstand defendants' motions for summary judgment.").

[215] 10A WRIGHT, *supra* note 11, § 2730, at 262-65 (citations omitted); ***see*** *also* Scheib v. Grant, 22 F.3d 149, 155 (7th Cir. 1994) (federal wiretapping statute).

Continued judicial reluctance to grant summary judgment in cases involving issues of motive or intent is misplaced.[216] Federal Rule of Civil Procedure 56 fails to distinguish state of mind from other issues, an omission that is apparently knowing and deliberate.[217] Further, Liberty Lobby was a significant departure from the Supreme Court's historical reluctance to grant summary judgment in such cases.[218] One of the most revealing aspects of the Court's opinion was its recognition that a mere contention that state of mind issues are implicated is insufficient to defeat a properly supported motion for summary judgment.[219]

In any case where intent or motivation is at issue, the basic allocation of burdens of proof remains the same.[220] **As** long as the moving party properly supports its motion, and the nonmoving party fails to present evidence setting forth specific facts that create a genuine issue of material fact regarding that motive or intent, summary judgment is proper.[221]

The typical disparate treatment Title VII[222] employment discrimination case serves as an excellent forum to illustrate this point. The Supreme Court articulated the parties' respective burdens of proof in *McDonnell Douglas* Corp. *v. Green.*[223] The Court

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[216]Sink, *supra* note 78, at 1925 ("viability of summary judgment with respect to . . . 'state of mind' cases cannot be questioned.");*see also* TRW Financial Sys., Inc. **v.** UNISYS Corp., 835 F. Supp. 994, 1002 (E.D. Mich. 1993) (After the Supreme Court trilogy, the Sixth Circuit has taken the position that cases involving state of mind issues may be appropriate for summary judgment); *cf.* Jansonius, *supra* note 101, at 747-48 ("Reluctance to award summary judgment [in employment discrimination cases] when pre-trial discovery fails to reveal evidence of discriminatory intent is no longer warranted.").

[217]David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach,* 70 NW. U. L. REV. 774, 786-87 (1983). The original drafters of the Rules declined to exclude particular issues of fact from the summary judgment process, despite state models that singled out state of mind issues as being inappropriate for summary judgment. *Id.* at 787 n.49.

[218]Jansonius, *supra* note 101, at 770.

[219]Sink, *supra* note 78, at 1923.

[220]Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988).*But cf.* Gallo v. Prudential Residential Serv., 22 F.3d 1219, 1224 (2d Cir. 1994) ("additional considerations should be taken into account").

[221]*Beard,* 840 F.2d at 410. ***See*** *also* 10A WRIGHT, *supra* note **11,** § 2730, at 58 (Supp. 1993).

[222]42 U.S.C. § 2000e (1988).

[223]411 U.S. 792 (1973). This burden shifting framework also applies to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1988). Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314 (4th Cir. 1993); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 565 n.11 (5th Cir. 1982), *cert. denied,* 467 U.S. 1215 (1984); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983); Howell v. Levi Strauss & Co., 840 F. Supp. 132, 134 (M.D. Ga. 1994); Reiff v. Philadelphia County Court Of Common Pleas, 827 F. Supp. 319, 324 (E.D. Pa. 1993).

determined that when an absence of direct evidence of discrimination exists, and the plaintiff is relying on circumstantial evidence, the plaintiff must first prove a prima facie case of discrimination by a preponderance of the evidence.[224] The elements of a prima facie case are flexible, varying with the specific adverse employment action.[225] The establishment of a prima facie case creates a presumption that the employer acted unlawfully and shifts the burden of production to the defendant.[226] **An** inference of discrimination is raised only because the court "'presume[s] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'"[227]

To rebut the presumption of discrimination, the defendant must set forth legitimate reasons for the challenged action.[228] Specifically, the defendant "must articulate some legitimate, nondiscriminatory reason" for its conduct.[229] The Supreme Court explained that this burden is not simply one of pleading; rather, the defendant must advance admissible evidence establishing a nondiscriminatory reason for the challenged employment action.[230] The defendant's burden is an easy one to satisfy. It is not required to persuade the court that its articulated reason for the employment decision is the true reason.[231] The defendant must only raise "a genuine issue of fact as to whether it discriminated against the plaintiff."[232]

Should the employer satisfy its burden, the plaintiff must prove by a preponderance of the evidence that the defendant's reasons are a pretext for discrimination233and that discrimination was the real reason for the challenged action.[234] The ultimate burden of

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[224]*McDonnell Douglas Corp.*, 411 U.S. at 802; Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742,2747 (1993).

[225]Jansonius, *supra* note 101, at 750.

[226]*Hicks,* 113 S. Ct. at 2747 (citations omitted); Lenoir v. Roll Coasters, Inc., 13 F.3d 1130, 1132 (7th Cir. 1994) (raising an inference of discrimination).

[227]Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (citing Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

[228]*Hicks,* 113 S. Ct. at 2747; Lenoir, 13 F.3d at 1133 (articulating a legitimate, nondiscriminatory reason).

[229]McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[230]Jansonius, *supra* note 101, at 750; Burdine, 450 U.S. at 254.

[231]*Burdine*, 450 U.S. at 254 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons."); see *also* Jansonius, *supra* note 101, at 750.

[232]*Burdine,* 450 U.S. at 254-55.

[233]*Id.* at 253; Lenoir, 13 F.3d at 1133 (focus on the specific reasons advanced by the defendant); McDonald v. Union Camp Corp., 898 F.2d 1153, 1160 (6th Cir. 1990).

[234]Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993); Moore v. Nutrasweet Co., 836 F. Supp. 1387,1395(N.D. Ill. 1993).

persuading the trier of fact that the defendant unlawfully discriminated remains at all times with the plaintiff.[235]

When deciding a motion for summary judgment, the trial judge must view the evidence through "the prism of the substantive evidentiary burden."[236] In a Title VII case, the plaintiff bears the ultimate burden of proof at trial. Accordingly, the substantive evidentiary burdens found in a Title VII case on the merits significantly affects summary judgment analysis.[237]

When the defendant is the moving party, its burden is satisfied by pointing out that the plaintiff cannot establish a prima facie case of discrimination.[238] To survive summary judgment, the plaintiff must be able to establish a prima facie case of discrimination.[239] If the defendant cannot articulate a legitimate, nondiscriminatory reason for its action, then summary judgment for the plaintiff is appropriate.240 However, if the defendant can articulate such a rea-

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[235]*Hicks,* 113 S. ct. at 2747; Wilkins v. Eaton Corp., 790 F.2d **515,** 520 (6th Cir. 1986); Baker v. Emery Worldwide, 789 F. Supp. 678,681 (W.D. Pa. 1991).

[236]Anderson v. Liberty Lobby, 477 U.S. **242,** 254 (1986); ***see*** *also* Reed v. Amax Coal Co., 971 F.2d 1295, 1297 (7th Cir. 1992) (" 'must consider both the substantive law of employment discrimination and the burden of proof under applicable law' ") (citation omitted); Collins v. Kahelski, 828 F. Supp. 614, 618 (E.D. Wisc. 1993) ("must also analyze summary judgment motions within the context of the legal standards governing the specific claims at issue . . . .").

[237]Foster v. Arcata Assoc., Inc., 772 F.2d 1453, 1459 (9th Cir. 1985), *cert.* ***denied,*** 475 U.S. 1048 (1986).

[238]Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991). Additionally, the defendant may offer its legitimate reason for the challenged personnel action at this point and force the plaintiff to establish both a prima facie case and prove that the defendant's reasons are a pretext for discrimination. Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

[239]Burton v. Great W. Steel Co., 833 F. Supp. 1266, 1276 (N.D. Ill. 1993); ***see*** *also Mitchell,* 12 F.3d at 1315 ("in response to a defendant's motion for summary judgment, the plaintiff must present admissible evidence to establish a prima facie case"); Washington **v.** Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) ("burden on summary judgment of a plaintiff asserting disparate treatment under Title VII is thus to establish a prima facie case of discrimination . . . ."); Howell v. Levi Strauss & Co., 840 F. Supp. 132, 136 (M.D. Ga. 1993); LaPointe v. United Auto Workers Local 600, 782 F. Supp. 347, 349 (E.D. Mich. 1992) (if plaintiff fails to establish a prima facie case his "claim fails as a matter of law."); *cf. Foster,* 772 F.2d at 1459 (plaintiff is not required to prove a prima facie case by a preponderance of the evidence; rather, it is only required to produce evidence sufficient to support a reasonable inference of discrimination); Moore v. Nutrasweet co., 836 F. Supp. 1387, 1395 (N.D. Ill. 1993) (need only establish a triable factual issue). However, "the establishment of a prima facie case does not in itself entitle an employment discrimination plaintiff to survive a motion for summary judgment in all cases." Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987); ***see*** *also* Price v. Public Serv. Co. of Colorado, 850 F. Supp. 934, 949 (D. Colo. 1994) ("A plaintiff who succeeds in establishing a prima facie case of disparate impact does not automatically survive a motion for summary judgment."); Jansonius, *supra* note 101, at 780 ("majority view holds that summary judgment may be awarded despite presentation of evidence sufficient to state a prima facie case").

[240]Barnhart v. Pickrel, Schaeffer & Ebeling Co., **12** F.3d 1382, 1390 (6th Cir. 1993).

son, the plaintiff must raise a genuine issue of material fact as to whether the articulated reason is pretextual to survive summary judgment.[241] If the plaintiff raises a genuine issue as to the legitimacy of the defendant's stated motive, summary judgment is inappropriate because it is for the trier of fact to determine which story is to be believed.[242] Conversely, if the plaintiff fails to provide adequate evidence of pretext in the face of the defendant's strong justification evidence, summary judgment is appropriate.[243]

In comparison, if the plaintiff is the moving party, the evidentiary requirements for summary judgment are analogous to the evidentiary requirements for a directed verdict.[244] The plaintiff must establish each element of its claim to such a degree of certainty that no reasonable trier of fact could find against it.[245] For summary judgment, the plaintiff must establish a prima facie case of discrimination and—if the defendant has articulated a legitimate reason for the challenged action or such a reason has been established through discovery—establish that the proffered reason is a pretext for discrimination.[246] If the plaintiff fails to make such a showing, of if the nonmovant-defendant presents sufficient evidence to raise a genuine issue of material fact, the plaintiff is not entitled to summary judgment.[247]

2. Complexity.—Courts should not deny a properly supported motion for summary judgment merely because of the case's complexity.[248] Indeed, summary judgment's utility as a mechanism for

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[241]*Barnhart,* 12 F.3d at 1389; *Mitchell,* 12 F.3d at 1315; *Washington,* 10 F.3d at 1433; Hankins v. Temple Univ., 829 F.2d 437, 441 (3d Cir. 1987); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983) ("must tender a genuine issue of material fact as to pretext in order to avoid summary judgment"); Reiff v. Philadelphia County Court Of Common Pleas, 827 F. Supp. 319, 324-25 (E.D. Pa. 1993).

[242]*Washington,* 10 F.3d at 1433. The plaintiff does not have to satisfy its trial burden by proving that the defendant's proffered reason is a pretext for discrimination; it must only create a genuine issue of fact on that issue that, if ultimately resolved in its favor, would meet its burden of persuasion at trial; *cf.* Weldon v. Kraft, Inc., 896 F.2d 793, 797 (3d Cir. 1990); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1395 (N.D. Ill. 1993).

[243]Lenoir v. Roll Coasters, Inc., 13 F.3d 1130, 1133 (7th Cir. 1994); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 596-97 (11th Cir. 1987).

[244]Foremaster, *supra* note 167, at 736.

[245]*Id.*

[246]*See* Reed v. Amax Coal Co., 971 F.2d 1295, 1299-1300 (7th Cir. 1992) (summary judgment entered against moving party plaintiff who failed to establish a prima facie case of discrimination and failed to establish that the defendant's articulated reasons for the challenged personnel action were a pretext for discrimination).

[247]Foremaster, *supra* note 167, at 736 (citing United States v. General Motors, 518 F.2d 420, 442 (D.C. Cir. 1975)).

[248]Lang v. Retirement Living Publishing Co., Inc., 949 F.2d 576, 580 (2d Cir. 1991) (affirming summary judgment despite argument that summary judgment is inappropriate given the factual complexity of the case); Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) ("complex cases not necessarily inappropriate for

the efficient resolution of disputes would be undermined seriously if unsubstantiated assertions were sufficient to compel a trial merely because they were factually or legally complex.[249]

The original Advisory Committee Note accompanying FRCP 56 stated that Rule 56 applied to all actions.[250] Neither FRCP 56 nor the Advisory Committee Note provides for the special handling of summary judgment motions in complex cases.[251] All civil actions subject to a motion for summary judgment—complex or simple—should be subject to the same standard.[252]

A series of Supreme Court cases during the 1940s served as the basis for a body of precedent that accords special treatment to factually complex cases.[253] In Arenas *v.* United *States*,[254] the Supreme Court reversed the grant of summary judgment after a full-blooded Mission Indian sued to be awarded a trust patent to certain land on the Palm Springs Reservation.[255] In reversing the summary disposition, the Court opined that a district court's duty under this legislation could "be discharged in a case of this complexity only by trial, findings and judgment in regular course."[256]

Current summary judgment case law has rejected the notion that a court should not grant summary judgment merely because the case is factually complex. The factual record in *Matsushita* was complex and, in the words of the Supreme Court, could "fill an

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summary judgment");*In re* Silicone Gel Breast Implants Prod. Liab. Litig., 837 F. Supp. 1128, 1132 (N.D. Ala. 1993) ("even litigation involving complex fact-intensive issues, such as in many antitrust cases, may be appropriately resolved through summary disposition . . . ."); Clorox Co. v. Winthrop, 838 F. Supp. 983, 988 (E.D.N.Y. 1993) (summary judgment remains a vital procedural tool in complex antitrust cases); Girl Scouts v. Bantam Doubleday Dell Pub., 808 F. Supp. 1112, 1118 (S.D.N.Y. 1992) ("Neither the volume of evidence nor the complexity of the case should preclude a grant of summary judgment if otherwise appropriate."); *see also* SISCLAIR, *supra* note 38, § 8.14, at 438 ("[summary judgment] not necessarily precluded merely because the facts or the legal issues are complex"); Sink, *supra* note 77, at 1925 (viability of summary judgment in complex cases cannot be questioned).

[249] SINCLAIR, *supra* note 38, § 8.14, at 438.

[250] 10A WRIGHT, *supra* note 11, § 2732, at 304 (citations omitted).

[251] *Id.*

[252] *Id.*; *see also* Amerinet, Inc. v. Xerox Corp. 972 F.2d 1483, 1490 (8th Cir. 1992) ("In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies.").

[253] 10A WRIGHT, *supra* note 11, § 2732, at 304 (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948); Eccles v. Peoples Bank of Lakewood Village, Cal., 333 U.S. 426 (1948); Arenas v. United States, 322 U.S. 419, 434 (1944)). Fortunately, the majority of lower courts determined that a complex factual situation did not necessarily bar summary judgment. Id. at 306.

[254] 322 U.S. 419 (1944).

[255] *Id.* at 420. The suit was brought pursuant to the Mission Indian Act of 1891 which allotted reservation land to individual Native Americans.

[256] *Id.* at 434.

entire volume of the Federal Supplement."[257] Nevertheless, the Court indicated that summary judgment was proper even in such complex antitrust cases.[258] As long as the record before the court establishes the absence of a genuine issue of material fact, the mere complexity of the case is an insufficient reason to deny summary judgment.

3. Evidentiary Standards — Federal Rule of Civil Procedure 56(e) permits the nonmoving party to resist a motion for summary judgment with "affidavits or as otherwise provided in this rule . . . ."[259] The facts on which the nonmovant relies must be admissible at trial,[260] but they do not need to be in admissible form.[261] In Celotex, the Court held that in opposing a motion for summary judgment, the nonmoving party need not "produce evidence in a form that would be admissible at trial . . . ."[262] As an illustration, the Court noted that FRCP **56** does not require the nonmoving party to depose its own witnesses.[263] The Court opined that FRCP **56** permitted a party opposing summary judgment to offer "any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . ."[264] Federal Rule of Civil Procedure 56(c)

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[257] *Matsushita,* 475 U.S. at 577; Sink, *supra* note 78, at 1924.

[258] *See also* Bertelsman, *supra* note 79, at 20 ("holding that summary judgment was proper even in a complex antitrust case").

[259] FED. R. CIV. P. 56(e).

[260] Fireman's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1310 (8th Cir. 1993) ("district court must base its determination regarding the presence or absence of a material factual dispute on evidence that will be admissible at trial"); Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 191 (5th Cir. 1991) ("long been settled law that a plaintiff must respond to an adequate motion for summary judgment with admissible evidence"); Marylanders for Fair Rep., Inc. v. Schaefer, 849 F. Supp. 1022, 1030 (D. Md. 1994) ("only such evidence as would be admissible at trial can be considered."); *In re* New America High Income Fund Sec. Litig., 834 F. Supp. 501, 506 (D. Mass. 1993) ("evidence must be introduced by affidavit, and it must be in admissible form"); Standard Fire Ins. Co. v. Rominger, 827 F. Supp. 1277, 1278 (S.D. Tex. 1993) ("must produce evidence admissible at trial"); Gonzales v. North Township of Lake County, 800 F. Supp. 676, 680 (N.D. Ind. 1992); Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990) ("a district court may consider only admissible evidence in ruling on a summary judgment motion").

[261] Schwarzer, *supra* note 194, at 481; ***see*** *also* Contini v. Hyundai Motor Co., 840 F. Supp. 22, 25 n.2 (S.D.N.Y. 1993) (need not be in admissible form). Presumably, the moving party — which submits affidavits or other evidence — is held to the evidentiary standards. ***See*** Thompson v. Dulaney, 838 F. Supp. 1535, 1539 (D. Utah 1993) ("movant satisfies its burden by producing evidence that is admissible as to content, not form . . . .").

[262] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

[263] *Id.*

[264] *Id.*

lists the following permissible evidence: affidavits; depositions; answers to interrogatories; and admissions on file.[265]

In the wake of *Celotex,* two schools of thought have emerged regarding the admissibility of evidence offered in opposition to a motion for summary judgment. A few courts have interpreted the Court's opinion to mean that inadmissible evidence may be considered without regard to whether the facts can be established at trial.[266] Most courts hold that the *Celotex* merely clarified the nonmovant's right to oppose summary judgment with any of the material listed in FRCP 56(c); including affidavits, which normally would constitute hearsay, or testimony contained in affidavits in a form not admissible at trial.[267]

The latter view seems to be the proper one. Summary judgment is designed to eliminate unnecessary litigation by testing the proof of the litigants.[268] In effect, summary judgment is a preview of the evidence that the litigants intend to introduce at trial.[269] As an adjunct to the test of proof, FRCP 56(e) specifically limits the use of affidavits to those made on personal knowledge, setting forth facts

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[265]FED. R. CIV. P. 56(c); *see* Clark v. Clabaugh, 20 F.3d 1290, 1294 (3d Cir. 1994) ("affidavits in support of summary judgments can be opposed by any admissible evidence, including that contained in 'the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if *any*"'). Some courts permit the use of verified pleadings, (i.e., those signed under oath) but only to the extent that these pleadings state specific facts and otherwise meet the requirements of proper affidavits. FRIEDENTHAL, *supra* note 11, § 9.2, at 437 (citations omitted). Rule 56 also permits the submission of sworn or certified copies of documents. FED. R. CIV. P. 56(e). Declarations offered in accordance with 28 U.S.C. § 1746 may be used in lieu of affidavits. Carney v. United States Dep't of Justice, 19 F.3d 807, 812 n.1 (2d Cir. 1994).

[266]Schwarzer, *supra* note 194, at 481 (citing Offshore Aviation v. Transcon Lines, 831 F.2d 1013, 1015 (11th Cir. 1987)); **see** *also* Bushman v. Halm, 798 F.2d 651, 654 n.5 (3d Cir. 1986) ("not obligated to produce rebuttal evidence which would be admissible at trial."); Cooper v. United States, 827 F. Supp. 1309, 1312 (E.D. Mich. 1993) ("evidence itself need not be the sort admissible at trial."); *cf.* Dow v. United Brotherhood of Carpenters and Joiners of America, 1 F.3d 56, 58 (1st Cir. 1993) ("the required proof need not necessarily rise to the level of admissible trial evidence . . . .").

[267]Schwarzer, *supra* note 194, at 481-82 (citations omitted); **see** *also* Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 192 (5th Cir. 1991); *cf.* Reed v. Amax Coal Co., 971 F.2d 1295, 1299 (7th Cir. 1992) ("A plaintiff raises adequate issues of fact when he presents evidentiary material which, if reduced to admissible evidence, may allow him to carry his burden of proof.").

[268]FED. R. CIV. P. 56 advisory committee's note (1963 Amendment); ***see*** *also* Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) ("summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial"); Bird v. Centennial Ins. Co., 11 F.3d 228, 231 (1st Cir. 1993) (" 'assay the parties' proof in order to determine whether trial is actually required'") (citations omitted).

[269]FRIEDENTHAL, *supra* note 11, § 9.2, at 437; ***see*** *also Mitchell,* 12 F.3d at 1316 (allowing the court to forecast the proof at trial).

admissible at trial, and made by persons competent to testify as to the matters contained within the affidavit.[270]

In support of, or in opposition to, summary judgment, the parties will want to ensure that any oral testimony that they intend to produce at trial is presented to the trial judge. Indeed, FRCP 43(e) authorizes the use of oral testimony, or in its place, affidavits or depositions, as evidence on motions before the court.[271] As a time saving mechanism, the courts require the oral testimony to be presented in affidavit form.[272] Although an affidavit normally would be inadmissible at trial as hearsay, it is admissible at the summary judgment stage. Accordingly, an affidavit satisfying the requirements of FRCP *56,* including testimony contained in the affidavit that *could* be cast into a form admissible *at trial,* may properly be considered.[273]

The vast majority of jurisdictions hold that a court may not consider an affidavit unless it is based on personal knowledge when

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[270]Specifically, FRCP 56 states: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." FED. R. CIV. P. 56(e). The United States Court of Appeals for the Seventh Circuit (Seventh Circuit) has opined that Rule **56's** personal knowledge requirement parallels Federal Rule of Evidence 602, which forbids a lay person from testifying about matters to which he has no personal knowledge. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); *cf.* Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175-76 (5th Cir. 1990) *("As* a general rule, the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial."); Conjour v. Whitehall Tp., 850 F. Supp. 309, 312 n.1 (E.D. Pa. 1994) ("documents relied on to decide summary judgment motions are subject to the Federal Rules of Evidence"); Courtaulds Aerospace, Inc. v. Huffman, 826 F. Supp. 345, 348 (E.D. Cal. 1993)("Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence generally.").

[271]Some courts have held FRCP 43(e) applies to motions for summary judgment, even though FRCP 56 does not address this point. FRIEDENTHAL, *supra* note 11, § 9.1, at 432 n.14 (citations omitted); 10A WRIGHT, *supra* note 11, § 2723 (citations omitted). Federal Rule of Civil Procedure 43(e) states: 'When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." FED. R. CIV. P. 43(e).

[272]FRIEDENTHAL, *supra* note 11, § 9.2, at 437.

[273]*See* Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 224-25 (7th Cir. 1993); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993) (may be considered if "it is capable of being admissible at trial"); Reed v. Amax Coal Co., 971 F.2d 1295, 1299 (7th Cir. 1992) (may consider "evidentiary material which, if reduced to admissible evidence, may allow him to carry his burden of proof').

resolving a summary judgment motion.[274] Supporting affidavits may not be based on rumor or conjecture275 or "'upon information and belief.'"[276] Courts may disregard those portions of an affidavit containing legal argument, argument based on fact, and statements outside the affiant's personal knowledge.[277] However, personal knowledge does include inferences drawn from sense data and the sense data themselves.[278]

Federal Rule of Civil Procedure *56* does not set forth a blanket prohibition against hearsay in a affidavit used to support or oppose summary judgment.[279] A court may consider hearsay contained in an affidavit if such information would be admissible at trial as an exception to Federal Rule of Evidence (FRE) 802's[280] prohibition against the admission of hearsay into evidence.[281] Inadmissible

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[274]M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 164 (4th Cir. 1992), *cert. denied,* 113 S. Ct. 2962 (1993); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); McLendon v. Georgia Kaolin Co., Inc., 837 F. Supp. 1231, 1236 (M.D. Ga. 1993); Burton v. Great W. Steel Co., 833 F. Supp. 1266, 1269 (N.D. Ill. 1993); United States v. Valore, 152 F.R.D. 1 (D. Me. 1993); Somavia v. Las Vegas Metro. Police Dep't, 816 F. Supp. 638, 640 (D. Nev. 1993); Reed Paper Co. v. Proctor & Gamble Distrib. Co., 807 F. Supp. 840, 846 (D. Me. 1992); Giordano v. William Paterson College, 804 F. Supp. 637, 640 (D. N.J. 1992). Familiarity with the proceedings does not constitute personal knowledge. Gonzales v. North Township of Lake County, 800 F. Supp. 676, 680 (N.D. Ill. 1992) (citing Walpert v. Bart, 280 F. Supp. 1006, 1010 (D. Md. 1967), *aff'd,* 390 F.2d 877 (4th Cir. 1968)). To be considered on summary judgment, deposition testimony also must be based on personal knowledge. Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990). If the error is harmless, a court's erroneous admission or exclusion of an affidavit that does not satisfy Rule 56(e)'s requirements does not require reversal of a summary judgment. Richardson v. Oldham, 12 F.3d 1373, 1378 n.13 (5th Cir. 1994). Reversal only is necessary if the erroneous admission or exclusion of evidence caused actual prejudice. J.R. Maffei v. Northern Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993). Appellate courts will review the decision to admit or exclude the evidence under an abuse of discretion standard. *Id.*

[275]*Palucki*, 879 F.2d at 1572.

[276]Conner v. Sakai, 15 F.3d 1463, 171 (9th Cir. 1993); *Burton,* 833 F. Supp. at 1269; *see also* KOENIGSBERGER, *supra* note 73, at 53 ("Affidavits based on information and belief will not be in compliance with the rule . . . .").

[277]Jarvis v. A & M Records, 827 F. Supp. 282, 287 (D. N.J. 1993).

[278]*Palucki*, 879 F.2d at 1572; *Burton,* 833 F. Supp. at 1269.

[279]Committee v. Dennis Reimer Co., 150 F.R.D. 495, 499 (D. Vt. 1993).

[280]The Rule states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

[281]*Reimer*, 150 F.R.D. at 499 (citing H. Sand & Co. v. Airtemp Corp., 934 F.2d 450, 454-55 (2d Cir. 1991)); *see also* Horta v. Sullivan, 4 F.3d 2, 8 (1st Cir. 1993); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (3d Cir. 1988); FDIC v. F.S.S.S., 829 F. Supp. 317, 320 n.4 (D. Alaska 1993); Airlie Found., Inc. v. United States, 826 F. Supp. 537, 546 (D.D.C. 1993); Jaret Int'l, Inc. v. Promotion In Motion, Inc., 826 F. Supp. 69, 72-73 (E.D.N.Y. 1993); SINCLAIR, *supra* note 38, § 8.14, at 442. This rule also applies to the use of deposition testimony for summary judgment. Wyrick v. Litwiller, 749 F. Supp. 981, 986 (W.D. Mo. 1990).

hearsay may neither defeat nor support a motion for summary judgment.[282]

Federal Rule of Civil Procedure 56(e) requires that all support attached to an affidavit be sworn or certified. Courts must disregard supporting documents that do not satisfy FRCP 56(e)'s requirements.[283] Before a court may consider supporting documentation, such evidence must be authenticated by and attached to an affidavit that satisfies FRCP 56(e)'s requirements, and the affiant must be a person through whom the document could be admitted into evidence at trial.[284]

As with other evidence submitted on a motion for summary judgment, parties to the suit waive the certification requirement if they fail to object timely.[285] The court may consider uncertified or otherwise inadmissible evidence if it is unchallenged.[286] Generally,

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[282] Fireman's Fund Ins. Co. v. Thien, 8 F.3d 1307, 1310 (8th Cir. 1993); Naantaanbuu v. Abernathy, 816 F. Supp. 218, 228 (S.D.N.Y. 1993); Reed Paper Co. v. Procter & Gamble Distrib. Co., 807 F. Supp. 840, 846 (D. Me. 1992); Garrett v. Lujan, 799 F. Supp. 198, 200 (D.D.C. 1992); *see also* Kimberlain v. Quinlan, 6 F.3d 789, 797 n.15 (D.C. Cir. 1993) (" 'normally' hearsay 'would not be enough to raise an issue of fact for summary judgment purposes"') (citation omitted); Marozsan v. United States, 849 F. Supp. 617, 625 (N.D. Ind. 1994) (evidence that is purely hearsay cannot be considered).

[283] Moore v. Holbrook, 2 F.3d 697, 699 (6th Cir. 1993) ("documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded"); Osri v. Kirkwood, 999 F.2d 86, 90 (4th Cir. 1993) ("unsworn, unauthenticated documents cannot be considered on a motion for summary judgment"); Hal Roach Studios v. Richard Feiner and Co., 896 F.2d 1542, 1550 (9th Cir. 1990) ("well established that unauthenticated documents cannot be considered on a motion for summary judgment"); Martz v. Union Labor Life Ins. Co., 757 F.2d 135, 138 (7th Cir. 1985) ("district court could not properly have relied upon the exhibits as submitted . . . ."); Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (attached medical records "were not certified as required by Fed. R. Civ. P. 56(e) and thus were not properly considered by the district court"); Mitchell v. Beaubouef, 581 F.2d 412, 414 (5th Cir. 1978) (error to grant summary judgment based upon unverified administrative report), *cert. denied,* 441 U.S. 966 (1979).

[284] *Hal Roach Studios,* 896 F.2d at 1550-51; *see also* 10A WRIGHT, *supra* note 11, § 2722, at 58-60. A certified copy of the document and an affidavit from the records custodian would serve as sufficient authentication. *Hal Roach Studios,* 896 F.2d at 1551 (citing FED. R. EVID. 901). Some documents, such as official publications, are self authenticating. Conjour v. Whitehall Tp., 850 F. Supp. 309, 312 n.1 (E.D. Pa. 1994).

[285] 10A WRIGHT, *supra* note 11, § **2722,** at 61; *see also* Moore v. Holbrook, 2 F.3d 697, 699 (6th Cir. 1993) (failure to object to unsworn and uncertified documents waives the issue); Michigan State Podiatry Assoc. v. Blue Cross and Blue Shield of Michigan, 681 F. Supp. 1239 (E.D. Mich. 1987) ("if an objection is untimely, it is deemed waived").

[286] 10A WRIGHT, *supra* note 11, § 2722, at 60; *see also Michigan State Podiatry Assoc.,* 681 F. Supp. at 1243 ("unchallenged materials may be considered by the Court").

a party may challenge the disputed evidence through a motion to strike.[287]

Federal Rule of Civil Procedure 56(c) permits the court to consider "admissions on file" when ruling on a motion for summary judgment. While admissions made pursuant to FRCP 36, including default admissions, may serve as a factual predicate for summary judgment,[288] the court also may consider other forms of admissions.[289] The court may consider admissions made at the pretrial conference, during oral argument on the motion, in connection with some other discovery procedure, or pursuant to a joint statement or stipulation of counsel.[290] The court also may consider an admission made by counsel in a written brief submitted in opposition to a motion for summary judgment.[291] However, a court may not convert an inference drawn from the record into an admission.[292]

Generally, courts will not consider other evidence that is inadmissible at trial in a motion for summary judgment. For example, in *Newport* Limited *v.* Sears, Roebuck *& Co.,*[293] the Fifth Circuit held that documents subject to the attorney-client privilege are inadmissible at trial and, accordingly, could not be used to defeat summary judgment.[294] Similarly, in Haavistola *v.* Community Fire Co. *of* Rising Sun, *Inc.,*[295] the United States Court of Appeals for the

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[287]*See* Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994); Lacey v. Lumber Mutual Fire Ins. Co. of Boston, 554 F.2d 1204, 1205 (1st Cir. 1977) (party may move to strike "affidavits containing evidence that would be inadmissible at trial as well as to affidavits that are defective in form"); Conde v. Velsicol Chem. Corp., 804 F. Supp. 972 (S.D. Ohio 1992); Gonzales v. North Township Of Lake County, 800 F. Supp. 676, 680 (N.D. Ind. 1992); *cf.* Scharf v. United States Attorney Gen., 597 F.2d 1240, 1243 (9th Cir. 1979) (formal defects in affidavits are waived absent a motion to strike or other objection); *In* re TuTu Wells Contamination Lit., 846 F. Supp. 1243, 1273 (D.V.I. 1993). The court may strike any matter that is "redundant, immaterial, impertinent, or scandalous . . . ." FED. R. CIV. P. 12(f).

[288]United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 549 (5th Cir. 1985); Donovan v. Carls Drug Co., 703 F.2d 650, 651 (2d Cir. 1983); Luick v. Graybar Elec. Co., 473 F.2d 1360, 1362 (8th Cir. 1973); Vermont v. Staco, Inc., 684 F. Supp. 822, 829 (D. Vt. 1988); Morris v. Russell, Burdsall & Ward Corp., 577 F. Supp. 147, 151 (N.D. Ohio 1983); EEOC v. Baby Prod. Co., 89 F.R.D. 129, 132 (E.D. Mich. 1981); Jackson v. Riley Stoker Corp., 57 F.R.D. 120, 122 (E.D. Pa. 1972).

[289]10A WRIGHT, supra note 11, § 2722, at 54; see also McKinley v. Afram Lines (USA) Co., 834 F. Supp. 510, 512 (D. Mass. 1993) ("not limited to admissions formally made pursuant to Rule 36 . . . .").

[290]10A WRIGHT, supra note 11, § 2722, at 54 (citations omitted).

[291]*McKinley*, 834 F. Supp. at 513.

[292]10A WRIGHT, supra note 11, § 2722, at 54.

[293]6 F.3d 1058 (5th Cir. 1993).

[294]*Id.* at 1064.

[295]6 F.3d 211 (4th Cir. 1993).

Fourth Circuit (Fourth Circuit) held that a district court abused its discretion under FRE 201(c) by taking judicial notice of adjudicative facts without any supporting evidence during a motion for summary judgment.[296]

Some courts and commentators believe that an expert's affidavit may be excluded from the summary judgment analysis if the material contained within the affidavit would be inadmissible at trial.[297] Accordingly, an expert's affidavit may be excluded if it is irrelevant, contains material more prejudicial than probative, the expert is not qualified, or the expert's opinion is not based on data reasonably relied on by experts in that field.[298]

One unresolved issue is whether a nonmoving party may defeat a motion for summary judgment by offering an expert's affidavit that complies with the *Federal Rules of Evidence,* but fails to provide the underlying facts or data supporting the expert's opinion.[299] Federal Rule of Civil Procedure 56(e) requires that a party opposing summary judgment respond by affidavits that "set forth *specific facts* showing that there is a genuine issue for trial."[300] However, the *Federal Rules of Evidence* generally apply to all civil actions and proceedings301 and FRE 705 permits an expert to testify "without prior disclosure of the underlying facts or data, unless the court requires otherwise."[302] Further, FRE **703** states

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[296]*Id.* at 218. When appropriate, a court may take judicial notice of facts in support of a motion for summary judgment. Aqua Queen Mfg., Inc. v. Charter *Oak* Fire Ins., 830 F. Supp. 536 (C.D. Cal. 1993); Gonzales v. North Township of Lake County, 800 F. Supp. 676, 681 (N.D. Ind. 1992); see *also* SINCWR, *supra* note 36, § 8.14, at 441.

[297]Schwarzer, *supra* note 194, at 483 (citing Washington v. Armstrong World Indus., 839 F.2d 1121, 1123-24 (5th Cir. 1988)).Although expert affidavits generally are permitted, " 'courts scrutinize expert affidavits rigorously to ensure that the proffered expert input is really helpful to the trier of fact."' 10A WRIGHT, *supra* note **11** \$ 2722, at 18 (Supp. 1993)(citation omitted).

[298]Schwarzer, *supra* note 194, at 483 (citing FRE 402, 403, 702 and 703, respectively); see *also* Brady v. DiBiaggio, 794 F. Supp. 663, 673 n.13 (W.D. Mich. 1992) (qualifications not contained in the affidavit). However, a court should not decide summary judgment based on the relative credibility of competing expert affidavits. Smith v. Hughes Aircraft Co., 10 F.3d 1448, 1456 (9th Cir. 1993).

[299]Sink, *supra* note 77, at 1927 (courts are split).

[300]FED. R. CIV. P. 56(e). Federal Rule of civil Procedure 56(e)'s specific facts requirement supplements the nonmoving party's burden, as articulated in Celotex, by "requiring evidence that precisely addresses the issue at hand rather than evidence exhibiting general implications concerning the relevant issue." Sink, *supra* note 78, at 1927 n.115.

[301]FED. R. EVID. 1101(b); see *also* M & M Medical Supplies, Inc. **v.** Pleasant Valley Hosp., Inc., 981 F.2d 160, 165 (4th Cir. 1992), cert. denied, 113 S. Ct. 2962 (1993).

[302]FED. R. EVID. 705.

that the facts and data relied on by the expert need not be in a form admissible at trial.[303]

Some courts take the position that an affidavit containing conclusory allegations without supporting specific facts is not saved by reference to the Federal Rules *of Evidence.*[304] These courts believe that regardless of the purpose of the evidentiary rules with respect to broadening the admissibility of expert opinions in general, these rules were not intended to alter the evidentiary standard necessary to defeat a motion for summary judgment.[305] Merely because a conclusionary expert report may be admissible at trial does not mean it is sufficient to defeat a properly supported motion for summary judgment.[306]

Other courts permit a party to supplement an expert's affidavit that is too conclusory to satisfy Rule 56(e).[307] The proponents of this position argue that '"the technical nature of the subject matter of such affidavits and the fluid state of the law governing their sufficiency and admissibility' justify supplementation rather than exclusion."[308]

Recently, in *M & M* Medical Supplies, *Inc. u.* Pleasant Valley Hospital, *Inc.*,[309] the Fourth Circuit examined the interplay between FRCP 56 and the expert testimony rules. The court opined that FRCP 56(e) "trump[ed]" the expert testimony rules with regard to the disclosure of facts.[310] With respect to the data supporting the facts, the court reconciled FRCP 56(e) with FRE 705 by concluding that neither rule required prior disclosure of the supporting data

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[303]*Id.* 703.

[304]Sink, *supra* note 78, at 1927 (citing Slaughter v. Southern Talc Co., 919 F.2d 304, 307 n.4 (5th Cir. 1990); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985); United States v. Various Slot Mach. on Guam, 658 F.2d 697, 700 (9th Cir. 1981); Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 673 (D.C. Cir. 1977)); Schwarzer, *supra* note 194, at 484 (citing Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)); *see also* Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993); *cf.* Richardson v. Oldham, 12 F.3d 1373, 1379 (5th Cir. 1994) (court did not err in striking affidavit of plaintiff's expert witness because affidavit was not based on specific facts).

[305]Sink, *supra* note 78, at 1927.

[306]*Id.*; *see also* Schwarzer, *supra* note 194, at 484.

[307]Sink, *supra* note 78, at 1927 (citing Ambrosini v. Labarraque, 966 F.2d 1464. 1469 (D.C. Cir. 1992); Bulthuis v. Rexall Corp., 789 F.2d 1315, 1317 (9th Cir. 1985)).

[308]Sink, *supra* note 78, at 1928 (citation omitted).

[309]981 F.2d 160 (4th Cir. 1992), *cert. denied,* 113 *S.* Ct. 2962 (1993).

[310]M & M Medical Supplies, Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160. 165 (4th Cir. 1992), *cert. denied,* 113 *S.* Ct. 2962 (1993); *see also* Sink, *supra* note 77. at 1928.

and both rules permitted supplementation of the expert's affidavit to disclose such data if the court deemed disclosure necessary.[311]

However, the court excused the expert affidavit's conclusory nature by drawing a semantic distinction between FRCP 56(e)'s requirement for specific facts and the lack of necessity of the data underlying the opinion.[312] Even though the affidavit's failure to include supporting data does not require its exclusion under the rules of evidence, this does not necessarily mean that the affidavit satisfies FRCP 56(e).[313] Federal Rule of Civil Procedure 56(e) mandates that affidavits "must set forth specific facts;" the permissive nature of FRE 705 does not justify circumventing this command.[314]

In Hayes *v.* Douglas Dynamics, *Inc.*,[315] the United States Court of Appeals for the First Circuit (First Circuit) articulated the proper relationship between FRCP 56 and the Federal Rules of Evidence for purposes of summary judgment. The First Circuit recognized the primacy of FRCP 56(e) over FRE *705*, stating that while the nonmoving party "may rely on the affidavits of experts in order to defeat a motion for summary judgment, such evidence must still meet the standards of Rule 56."[316]

Federal Rule of Evidence 705, which permits an expert to give opinion testimony without disclosing the underlying facts or data, is "inapposite" to FRCP 56(e)'s requirement that the nonmoving party set forth specific facts establishing a triable issue.[317] Federal Rule of Evidence 705 was not drafted with summary judgment in mind; instead, it was designed to apply in the trial environment, where the parties may test the expert's conclusions by probing the underlying facts and data on cross-examination.318Accordingly, while evidence submitted on summary judgment must still be admissible, any conflict between the requirements of FRCP 56 and the evidentiary rules must be resolved in favor of the former.

4. Discovery Delay—The application of the current summary judgment standard to the nonmoving party, requiring it to produce sufficient evidence to create a material factual dispute, increases

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[311] *M & M Medical* ***Supplies,*** 981 F.2d at 165.

[312] Sink, *supra* note 78, at 1928.

[313] *Id.*

[314] *Id.* at 1929. Otherwise, any conclusory affidavit could defeat summary judgment simply by characterizing the lack of specific facts as a lack of underlying data. *Id.*

[315] 8 F.3d 88 (1st Cir. 1993).

[316] *Id.* at 92.

[317] *Id.*

[318] *Id.*

the importance of FRCP 56(f).[319] Both FRCP 56(f) and the Supreme Court recognize that the right to trial should not be denied simply because a litigant has not had the opportunity to gather sufficient evidence to establish the existence of a genuine issue of material fact.[320] In *Liberty Lobby*, the Court opined that the nonmoving party was obligated to present "affirmative evidence" in opposition to a motion for summary judgment "even where the evidence is likely to be within the possession of the [moving party] as long as the [nonmoving party] has had a full opportunity to conduct discovery."[321] Similarly, in *Celotex*, the Court directed that the opposing party be afforded "adequate time for discovery" before the court could grant summary judgment.[322]

Federal Rule of Civil Procedure 56(f) has not operated to seriously undermine or unnecessarily delay effective use of summary judgment.[323] Historically, courts have strictly required parties to act diligently under FRCP 56(f) and present the requisite affidavit describing the nature of the information they expect to obtain through discovery.[324] Appellate courts generally have upheld grants

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[319]Federal Rule of Civil Procedure 56(f) states:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[320]Sonenshein, *supra* note 216, at 785.

[321]Anderson v. Liberty Lobby, Inc., 477 U.S. 255, 257 (1986).

[322]Celotex Corp. v. Catrett, 477 US. 317, 322 (1986);*see also* Dow v. United Brotherhood of Carpenters and Joiners of America, 1 F.3d 56, 60 (1st Cir. 1993) (Court in ***Celotex*** recognized the requirement of adequate time for discovery).

[323]Blaze, *supra* note 89, at 982 n.296.

[324]Friedenthal, *supra* note 21, at 780 n.39; *see* Murphy v. Timberlane Regional School Dist., 22 F.3d 1186, 1197 (1st Cir. 1994) ("required affidavit"); Pastore v. Bell Telephone Co., 24 F.3d 508, 510 (3d Cir. 1994) (failure to file affidavit is usually fatal); Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989)("[w]e call to the attention of the bar one again the [affidavit] *requirement* of the Rule"); National Acceptance Co. of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1318 (E.D. Wis. 1993) (denying continuance for failure to file requisite affidavit). *But cf.* Saint Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1314 (3d Cir. 1994) ("Although we again emphasize the desirability of full compliance with Rule 56(f), failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration."); International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 936 (1992) (Although an affidavit is preferred, "so long as the nonmoving party indicates to the court by 'some equivalent statement, preferably in writing' of its need for additional discovery, the nonmoving party is deemed to have invoked the rule.").

of summary judgment when the nonmoving party has not satisfied the Rule's requirements.325

A party opposing summary judgment does not possess an absolute right to additional time for discovery under FRCP 56(f).326 This provision was not designed to act as "'a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious.'"327 Rather, the Rule provides a mechanism by which a party may request additional time.328 Federal Rule of Civil Procedure 56(f) requires that a party opposing a motion for summary judgment submit an affidavit requesting a continuance to conduct additional discovery.329 Generally, to satisfy FRCP 56(f)'s requirements, the party seeking a continuance must submit an affidavit setting forth: "(1) what facts are sought and how they are to be obtained; **(2)** how those facts are reasonably expected to create a genuine issue of material fact; **(3)** what effort the affiant has made

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325Friedenthal, *supra* note 21, at 780 n.39 (citing Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusements, Inc., 824 F.2d 710 (9th Cir. 1987), *cert. denied,* 487 U.S. 1247 (1988); Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828 (10th Cir. 1986)); *see also* Murphy v. IBM, 23 F.3d 719, 722 (2d Cir. 1994) (affirming grant of summary judgment); Chambers v. American Trans. Air, Inc., 17 F.3d 998, 1002 (7th Cir. 1994) ("Because Chambers failed to file a timely Rule 56(f) affidavit, the court's refusal to give Chambers any further time for additional discovery was not an abuse of discretion."); Humphreys v. Roche Biomedical Lab., Inc., 990 F.2d 1078, 1081 (8th Cir. 1993) (affirming grant of summary judgment). An appellate court will review a district court's denial of a Rule 56(f) motion for an abuse of discretion. Bird v. Centennial Ins. Co., 11 F.3d 228, 235 (1st Cir. 1993); Jensen v. Redevelopment Agency, 998 F.2d 1550, 1553 (10th Cir. 1993); *Humphreys,* 990 F.2d at 1081.

326Emmons v. McLaughlin, 874 F.2d 351, 356 (6th Cir. 1989); Harwell v. American Medical Sys., Inc., 803 F. Supp. 1287, 1294 (M.D. Tenn. 1992).

327*Humphreys,* 990 F.2d at 1081 (citations omitted); *see also Emmons,* 874 F.2d at 356 (not a shield).

328*Emmons,* 874 F.2d at 356.

329Federal Rule of Civil Procedure 56(f) states: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." FED. R. CIV. P. 56(f); *see also* DiCesare v. Stuart, 12 F.3d 973, 979 (10th Cir. 1993) ("if DiCesare felt he could not oppose defendants' motions for summary judgment without more information, he should have submitted an affidavit pursuant to Fed. R. Civ. P. 56(f) requesting a continuance until further discovery was had); Hickman v. Wal-Mart Stores, Inc., 152 F.R.D. 216, 221 (M.D. Fla. 1993) (must file an affidavit); *cf.* Lorenzo v. Griffith, 12 F.3d **23,** 27 n.5 (3d Cir. 1993) ("Under accepted practice, when additional discovery is needed, a Rule 56(f) motion should be filed, explaining why opposing affidavits are unavailable.").

to obtain them; and (4) why the affiant was unsuccessful in those efforts."[330]

Federal Rule of Civil Procedure 56(f)'s requirements are not satisfied by vague assertions, such as the opposing party possesses "certain information" or "other evidence.'"[331] If the party seeking a continuance cannot show how additional discovery will create a factual dispute, or if the court believes that additional discovery will prove fruitless, the court may deny the continuance and grant summary judgment.[332]

5. Multiple Attempts at Summary Judgment — Nothing in FRCP 56 precludes multiple attempts at summary judgment. A court's denial of summary judgment does not bar a second motion that brings different matters before the court.[333] Further, in ruling on a motion for summary judgment, a district court judge may grant the motion even if it was previously denied by a different judge.[334] Some courts take the position that, because the denial of a motion for summary judgment is an interlocutory order, a court may reconsider its denial for any reason, even in the absence of new evidence or an intervening change in the applicable law.[335] However, a motion for summary judgment may not be made on the same

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[330]Hudson River Sloop Cleanvater v. Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989); *see also* Ammcon, Inc. v. Kemp, 826 F. Supp. 639, 646 (E.D.N.Y. 1993); *Hickman,* 152 F.R.D. at 221; *cf.* Bird v. Centennial Ins, Co., 11 F.3d 228, 235 (1st Cir. 1993) ("required (1) to articulate a plausible basis for its belief that the requested discovery would raise a trialworthy issue, and (2) to demonstrate good cause for failing to have conducted the discovery earlier"); Radich v. Goode, 855 F.2d 1391, 1393-94 (3d Cir. 1989) ("requires that a party indicate to the district court its need for discovery, what material facts it hopes to uncover and why it has not previously discovered the information."); National Acceptance Co. of America v. Regal Prod., Inc., 838 F. Supp. 1315, 1318 (E.D. Wis. 1993) ("obligated to demonstrate affirmatively why it 'cannot respond to movant's affidavits . . . and how postponement of a ruling on the motion will enable [it], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact'"1 (citation omitted).

[331]Keebler Co. v. Murray Bakery Prod., 866 F.2d 1386, 1389 (Fed. Cir. 1989); *see also* Strang v. United States Arms Control & Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir. 1989) (plea too vague to require court to defer or deny summary judgment); Reflectone, Inc. v. Farrand Optical Co., Inc., 862 F.2d 841, 843 (11th Cir. 1989) ('"may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts' . . . ."); *Hickman,* 152 F.R.D. at 221 (vague assertions insufficient).

[332]Norris v. Davis, 826 F. Supp. 212, 216 (W.D. Ky. 1993).

[333]10 WRIGHT, *supra* note 11, § 2713, at 605; *see also* Pantry, Inc. v. Stop-N-Go Foods, Inc., 796 F. Supp. 1164, 1168 n.3 (S.D. Ind. 1992) ("no rule against multiple attempts at a favorable summary judgment on different legal theories based upon the same allegation of fact"); Jackson v. Norris, 748 F. Supp. 570, 571 (M.D. Tenn. 1990) (different grounds).

[334]Shouse v. Ljunggren, 792 F.2d 902, 904 (9th Cir. 1986).

[335]Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990).

grounds as a previously denied motion to dismiss or motion for judgment on the pleadings.[336]

V. Existing Mechanisms for Interlocutory Relief Following Summary Judgment Denials

A. *The Final Judgment Rule*

As a general rule, courts of appeal have jurisdiction, pursuant to 28 U.S.C. § 1291, to hear appeals of a district court's "final" decision.[337] For purposes of § 1291, a final decision "is generally regarded as 'a decision by the district court that ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment.'"[338] An order ensuring that the litigation remains in district court is not a final decision.[339] Accordingly, appeal is precluded from any decision "'which is tentative, informal or incomplete,' as well as from any 'fully consummated decisions, where they are but steps towards final judgment in which they will merge.'"[340]

The purpose of the final judgment rule "is to combine in one review all stages of the proceeding that effectively may be reviewed

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[336] 10 WRIGHT, *supra* note 11, § 2713, at 606-07.

[337] Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., 10 F.3d 1563, 1565 n.2 (11th Cir. 1994); Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993); Wright v. South Ark. Regional Health Ctr., Inc., 800 F.2d 199, 202 (8th Cir. 1986). Section 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The genesis of 28 U.S.C. § 1291 may be found in the Judiciary Act of 1789 in which the First Congress established that "only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

[338] Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989) (citations omitted); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988) (citation omitted); *see also* Firstier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 273-74 (1991) ("For a ruling to be final, it must 'en[d] the litigation on the merits'. . .and the judge must 'clearly declar[e] his intention in this respect.'") (citations omitted); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993); *Marler*, 997 F.2d at 1142; Madry v. Sorel, 440 F.2d 1329, 1330 (5th Cir. 1971) (not a final judgment because the order "contemplated further action on the merits"). As an illustration, an order granting summary judgment is a final order because the court has made a final determination on the merits of the case. Note, *The Immediate Appealability of Rule 11 Sanctions*, 59 GEO. WASH. L. REV. 683, 687-88 (1991). In the criminal context, a final judgment does not occur until after conviction and imposition of sentence. *Midland Asphalt*, 489 U.S. at 798.

[339] *Gulfstream*, 485 U.S. at 275.

[340] Puerto Rico Aqueduct And Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

and corrected if and when final judgment results."[341] The rule promotes judicial efficiency and emphasizes the deference appellate courts owe to district court decisions arising before judgment.[342] While acknowledging that immediate review of interlocutory decisions would permit more prompt correction of erroneous rulings, the Supreme Court opined that such immediate appellate review would generate unreasonable disruption, delay, and expense; and would undermine the ability of trial judges to supervise litigation.[343] Further, the Court views § 1291 as an expression of Congress's preference to permit some erroneous district court rulings to go uncorrected until appeal of the final judgment, rather than having the litigation disrupted by piecemeal appellate review.[344]

Normally, the law does not consider a district court's denial of a motion for summary judgment to be a final and immediately appealable decision.[345] The motion denial is not a final judgment, but is "'merely a judge's determination that genuine issues of material fact exist.'"[346]

As noted earlier, most jurisdictions will not permit a party to appeal a summary judgment denial after a full trial on the merits.[347] Even when summary judgment is erroneously denied, the

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[341] *Cohen*, 337 U.S. at 546. The finality rule is strictly applied in the criminal context "because 'encouragement of delay is fatal to the vindication of the criminal law.'" United States v. MacDonald, 435 U.S. 850, 854 (1978) (citations omitted).

[342] Richardson-Merrill Inc. v. Koller, 472 U.S. 424, 430 (1985).

[343] *Id.*

[344] *Id.* (citing United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)); *see also* Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993) ("Section 1291's finality requirement 'embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing proceeding by interlocutory appeals.'") (citation omitted).

[345] *See supra* note 23.

[346] Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), *cert.* denied, 113 S. Ct. 1417 (1993); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 [Fed. Cir. 1986), *cert.* dismissed, 479 U.S. 1072 (1987); *see also* Switzerland Cheese Ass'n., Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966) ("strictly a pretrial order that decides only one thing—that the case should go to trial").

[347] Schmidt v. Farm Credit Serv., 977 F.2d 511, 513 n.3 (10th Cir. 1992); Lum v. City and County of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992) ("noneed to review denials of summary judgment after there has been a trial on the merits"); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) ("Denial of summary judgment is not properly reviewable on appeal from a final judgment entered after a full trial on the merits."); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990) ("where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed"); Holley v. Northrop Worldwide Aircraft Serv., Inc., 835 F.2d 1375, 1378 (11th Cir. 1988) ("a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which mitigate against his case"); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986) ("a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial."), *cert.* dismissed, 479 U.S. 1072 (1987). The district court's judgment after a full trial on the merits supersedes the earlier summary judgment determination. Johnson Intern. Co. v. Jackson Nat. Life Ins. Co., 19 F.3d 431, 434 (8th Cir. 1994).

United States Court of Appeals for the Tenth Circuit (Tenth Circuit) has held that the moving party's proper redress is through a subsequent motion at trial for judgment as a matter of law, and appellate review of that motion if denied.[348]

District and/or circuit court review of a motion for judgment as a matter of law is an inadequate substitute for appellate review of an order denying summary judgment. First, the Tenth Circuit's solution ignores the cost and unnecessary waste of resources associated with bringing the case to trial when the district court should have terminated the litigation at the summary judgment stage.[349] Second, the Tenth Circuit's solution severely weakens the Supreme Court's touted role of summary judgment, as a means of quickly and inexpensively disposing of meritless litigation, by failing to provide an effective enforcement mechanism against district courts that deny summary judgment motions for improper or erroneous reasons. Third, this solution ignores the distinction—albeit a formal one—between the two rules of procedure concerning at what point in time a court reviews the sufficiency of a party's evidence.[350]

As a limited exception to the general rule prohibiting immediate appeal of summary judgment denials, courts will permit a party to appeal a denied motion for summary judgment when that same party appeals an order granting a cross-motion for summary judgment to an opposing party.[351] When a court of appeals reverses the grant of one party's motion for summary judgment, the court may review the denial of the other party's motion so long as it is clear that the party opposing the cross-motion had an opportunity to dis-

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[348] *Schmidt,* 977 F.2d at 513 n.3; Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), ***cert. denied,*** 113 S. Ct. 1417 (1993); ***see also*** Watson v. Amedco Steel, Inc., 29 F.3d 274, 279 (7th Cir. 1994)(agreeing with the Tenth Circuit's position).

[349] Attorney's fees constitute a large—oftentimes prohibitive—cost associated with defending a lawsuit. Because the federal system follows the "American Rule," which requires each party to bear its own attorney fees, a litigant who is denied summary judgment but later is victorious at trial still will be required to pay its attorneys for their effort during that interim period. ***See*** Cruz v. Local Union No. 3 of Intern. Broth., 34 F.3d 1148, 1158-59 **(2d** Cir. 1994); Lee v. Chambers County Bd. of Educ., 859 F. Supp. 1470, 1472 (M.D. Ala. 1994). In a civil rights suit, the prevailing party defendant may recover its attorney's fees only if it can prove that the plaintiffs lawsuit was "frivolous, unreasonable, or without foundation." ***Lee,*** 859 F. Supp. at 1472 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412,421 (1978)).

[350] The legal standard for FRCP 50 and 56 is the same; however, the court reviews the legal sufficiency of the evidence at different litigation junctures. Armstrong v. City of Dallas, 997 F.2d 62, 66 (5th Cir. 1993).

[351] *See* Dowling v. Davis, 19 F.3d 445, 446 n.2 (9th Cir. 1994); Morgan v. Harris Trust and Sav. Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989).

pute the material facts.[352] The district court's initial grant of one motion for summary judgment is a final order that gives an appellate court jurisdiction to review the district court's denial of the opposing party's motion.[353] Significantly, although the circuit court's decision to review the denial is an exercise of discretion, it is not bound to do so.[354] When exercised, that discretion usually is used to promote judicial economy.[355]

B. Interlocutory Appeal

As a statutory exception to the final judgment rule, a moving party may ask the district court to certify its order denying summary judgment pursuant to 28 U.S.C. § 1292(b).[356] This statute permits the district court to certify an order "not otherwise appealable" to the court of appeals.[357] The order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation . . . ."[358]

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[352]McIntosh v. Scottsdale Ins. Co., 992 F.2d 251, 253 (10th Cir. 1993); *see also* Stroehman Bakeries v. Local 776, 969 F.2d 1436, 1440 (3d Cir. 1992); Peyton v. Reynolds Assoc., 955 F.2d 247, 253 (4th Cir. 1992); Abend v. MCA, Inc., 863 F.2d 1465, 1482 n.20 (9th Cir. 1988), *affirmed*, 495 U.S. 207 (1990); Barhold v. Rodriguez. 863 F.2d 233, 237 (2d Cir. 1988); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 19681. Some appellate courts review both the grant and denial of a motion for summary judgment de novo, using the same standard as applied by the district court. *See* Hammer v. Slater, 20 F.3d 1137, 1140 (11th Cir. 19941; Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994); Bender v. Brumley, 1 F.3d 271, 275 (5th Cir. 1993); Schmidt v. Farm Credit Serv., 977 F.2d 511, 514 (10th Cir. 1992). Other courts review summary judgment grants de novo, but review denials for an abuse of discretion. *See* Leila Hosp. And Health Cent. v. Xonics Medical Sys., Inc.. 948 F.2d 271, 275 (6th Cir. 1991); Veillon v. Exploration Serv., Inc., 876 F.2d 1197, 1200 (5th Cir. 1989); Pinney Dock And Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. *880* (1988).

[353]*Stroehmann Bakeries*, 969 F.2d 1440; *Abend*, 863 F.2d at 1482 n.20.

[354]High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563. 574 n.11 (9th Cir. 1990); American Motorists Ins. Co. v. United Furnace Co., 876 F.2d 293, 302 (2d Cir. 1989); *Barhold*, 863 F.2d at 237; *cf.* Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 278-79 (5th Cir. Unit A Mar. 1981) (refused to review denial).

[355]*American Motorists Ins.*, 876 F.2d at 302; *Barhold*, 863 F.2d at 237 ("for reasons of judicial economy, realizing that the issues presented by both motions are inextricably bound).

[356]Pacific Union Conf. of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306 (1977); Lum v. City and County of Honolulu, 963 F.2d 1167, 1169-70 (9th Cir. 1992) ("appropriate forum to review the denial of a summary judgment motion is through interlocutory under 28 U.S.C. § 1292(b)"); Chappell & Co. v. Frankel. 367 F.2d 197, 200 (2d Cir. 1966) (recognizing the possibility).

[357]28 U.S.C. § 1292(b) (1993); *see* EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 19931.

[358]28 U.S.C. § 1292(b) (1993). The entire stated criteria must be met before review is appropriate. FRIEDENTHAL, *supra* note 11, § 13.3, at 593.

Certification is in the district court's discretion[359] and courts grant them only in exceptional circumstances.[360] If the district court elects not to certify, the court of appeals is without jurisdiction to review the order denying summary judgment.[361] Additionally, the appellate court has absolute discretion to accept or reject the district court's certification.[362] By its terms, § 1292(b) is the most limited exception to the final judgment rule; unless both the district court and the court of appeals agree to an early appeal, the appeal is not heard.[363] Further, in practice, district and circuit courts permit few section 1292(b) appeals.[364]

Interlocutory appeal presents a possible, but unlikely, avenue of appeal for summary judgment denials. In Chappell & Co. *u. Frankel,*[365] the Second Circuit opined that when the applicable law is clear but the district court denies a motion for summary judgment based on a genuine issue of material fact, it is "doubtful" that the issue can properly be certified because there is no controlling issue of law to be determined.[366] Similarly, in SCI Systems., Inc. *u.* Solidstate Controls, Inc.,[367] the district court declined to certify its order denying summary judgment. In denying the summary judg-

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[359]Philan Ins. v. Frank B. Hall & Co., 136 F.R.D. 80, 82 (S.D.N.Y. 1991). Appellate courts are very sensitive to the trial judge's determination on these questions and, if the trial judge has refused certification, the appellate courts will not use mandamus to force the trial judge to certify the issue for appeal. FRIEDENTHAL, *supra* note 11, § 13.3, at 593.

[360]Burns v. County of Cambria, Pennsylvania, 788 F. Supp. 868, 869 (W.D. Pa. 1991); *Philan,* 136 F.R.D. at 82; *see also* FRIEDENTHAL, *supra* note 11, § 13.3, at 592 n.16 ("granted cautiously and only in exceptional cases").

[361]Fluor Ocean Serv. v. Hampton, 502 F.2d 1169, 1170 (5th Cir. 1974); *see also* FRIEDENTHAL, *supra* note 11, § 13.3, at 592 n.15 ("Numerous opinions state that absent a trial judge's certification, there is no appellate jurisdiction.") (citations omitted).

[362]Jeffrey W. Stempel, *Renhquist, Recusal, and Reform,* 53 BROOK. L. REV. 589, 634 (1987).

[363]Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution,* 54 U. PITT. L. REV. 718, 733 (1993). Courts of appeals frequently exercise their discretion not to hear appeals of certified cases. *Id.* at 734. As an illustration, between 1987 and 1988, the Sixth Circuit agreed to hear only 27% of certified appeals. *Id.* The United States Supreme Court has permitted appellate courts to refuse to hear certified cases "'for any reason, including docket congestion."' *Id.* (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).

[364]Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts,* 58 GEO. WASH. L. REV. 1165-66, 1173-74 (1990) ("'relatively few appeals are certified at the district court level or accepted by the circuit courts."). Solimine opines that many circuit courts grant § 1292(b) appeals only in "big, exceptional" cases. *Id.* at 1173.

[365]367 F.2d 197 (2d Cir. 1966).

[366]*Id.* at 200 n.4.

[367]748 F. Supp. 1257 (S.D. Ohio 1990).

ment motion, the district court determined that genuine issues of material facts existed regarding the defendant's laches defense.[368] Because the summary judgment denial involved a "fact-specific decision" only, the court opined that certification of an interlocutory appeal was unwarranted.[369]

C. Mandamus

The Supreme Court and all lower courts established by Congress may issue any writ "necessary or appropriate in aid of their jurisdictions and agreeable to the usages and principles of law."[370] Mandamus may be an available remedy to challenge an order that is not normally appealable because it is not final and does not fall within an exception to the finality doctrine.[371]

Although federal courts of appeal have the power to issue extraordinary writs under the All Writs Act,[372] a writ of mandamus is a disfavored remedy because its broad use interferes with the judicial policy against piecemeal appeals, and it has the unfortunate consequence of making a district court judge a litigant.[373] Even when the basic requirements for mandamus are satisfied, courts do not award mandamus relief as a matter of right, but rather grant it

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[368] *Id.* at 1265.

[369] *Id.*

[370] Communications Workers Of America v. American Telephone And Telegraph Co., 932 F.2d 199, 208 (3d Cir. 1991); 32 AM. JUR. 2D *Federal Practice and Procedure* § 253, at 775-76 (1982). These writs include mandamus, prohibition, and quo warranto. *Id.* at 776; ***see*** *also* Pas v. Travelers Ins. Co., 7 F.3d 349, 353 (3d Cir. 1993) ("Mandamusis authorized by the All Writs Act, 28 U.S.C. § 1651(a) . . . ."); *In re* NLO, Inc., 5 F.3d 154, 155 (6th Cir. 1993) ("This court may issue a writ of mandamus pursuant to the All Writs Act . . . .").

[371] *Communication Workers,* 932 F.2d at 208. Technically, mandamus is not an appeal; it is an original proceeding in an appellate court seeking an order directing the district court judge to enter or vacate a particular order. FRIEDENTHAL, *supra* note 11, § 13.3, at 594-95.

[372] 28 U.S.C. § 1651(a) (1988).

[373] Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 34, 35 (1980); Kerr **v.** United States Dist. Court for the N. Dist. of Cal., 426 U.S. 394, 402-03 (1975); *In re* School Asbestos Litig., 977 F.2d 764, 772 (3d Cir. 1992); *In re* Life Ins. Co. of N. America, 857 F.2d 1190, 1192 (8th Cir. 1988); ***see*** *also* Star Editorial, Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 7 F.3d 856, 859 (9th Cir. 1993) ("used sparingly because it entails interference with the district court's control of the litigation before it"). As a litigant, the trial judge may either hire counsel or permit counsel of a party to represent him, raising questions of potential bias in subsequent rulings in the case. Karen N. Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts,* 35 HASTINGS L. J. 829, **845** (1984). Further, forcing the judge into the role of a litigant reduces respect for the judiciary and the judicial system. *Id.*

as an act of discretion.[374] Although frequently sought, writs of mandamus rarely are issued.[375]

Traditionally, courts will issue a writ of mandamus "only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[376] The power to issue such writs is used sparingly and invoked only in extraordinary circumstances.[377] Mandamus is not available when a judge simply errs without abusing his or her judicial authority.[378]

Before a court will issue a writ of mandamus, the party seeking it must establish that it lacks adequate alternative means to obtain the relief it seeks and its right to issuance of the writ is "'clear and indisputable.'"[379] To satisfy this heavy burden and obtain extraordinary relief, the petitioner must demonstrate a clear abuse of discretion[380] or circumstances amounting to a judicial

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[374] *Kerr*, 426 U.S. at 403 ("issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3d Cir. 1993) ("largely discretionary"); Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir. 1993); *see also* Moore, *supra* note 373, at 845 ("the decision to grant the writ is ultimately within the discretion of the appellate court."); 32 AM. JUR. 2D *Federal Practice and Procedure* § 258 (1982) ("awarded not as a matter of right but in the exercise of a sound judicial discretion and upon equitable principles").

[375] Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 865 (1st Cir. 1993); *see also Allied Chem. Corp.*, 449 U.S. at 36 ("ourcases have answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!'"); *In re* United States, 10 F.3d 931, 933 (2d Cir. 1993) ("an extraordinary remedy that this court does not grant lightly . . . .").

[376] Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 308 (1989); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 34, 35 (1980) (citations omitted); *Kerr*, 426 U.S. at 402 (citations omitted).

[377] *Doughty*, 6 F.3d at 865; *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) ("an extraordinary remedy, to be reserved for extraordinary situations"); Star Editorial, Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 7 F.3d 856, 859 (9th Cir. 1993) ("used sparingly"); Western Shoshone Business Council v. Babbitt, 1 F.3d 1052, 1059 (10th Cir. 1993) ("drastic remedy, available only in extraordinary circumstances"); *In re* Life Ins. Co. of N. America, 857 F.2d 1190, 1192 (8th Cir. 1988) ("invoked only in extraordinary situations"); Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987) ("extraordinary remedy which should only be utilized in the clearest and most compelling of cases").

[378] Moore, *supra* note 373, at 842; *see also In re* Steinhardt Partners, L.P., 9 F.3d 230, 234 (2d Cir. 1993) (even if the judge was "'very wrong . . . that is not enough'") (citation omitted).

[379] *Mallard*, 490 U.S. at 309; *Allied Chem. Corp.*, 449 U.S. at 35; *Kerr*, 426 U.S. at 403; *see also Steinhardt*, 9 F.3d at 233; Garcia v. Island Program Designer, Inc., 4 F.3d 57, 60 (1st Cir. 1993); *Life Ins. Co. of N. America*, 857 F.2d at 1193; *Matthews*, 810 F.2d at 113 (plain duty to act, petitioner has a plain right to the performance, and no other adequate remedy to vindicate petitioner's rights). A writ of mandamus is not available when review by other means is "possible." *Western Shoshone*, 1 F.3d at 1058.

[380] *Mallard*, 490 U.S. at 309.

usurpation of power.[381] The standard requires "an 'extreme need for reversal.'"[382]

An appellate court may issue a writ of mandamus when the district court commits a clear error of law arising to the level of an unauthorized exercise of judicial power, or fails to exercise its power when there is a clear duty to do so.[383] However, even with a showing of clear error that would otherwise escape review and a showing that a party's right to relief is clear and indisputable, an appellate court is not required to issue a writ of mandamus.[384]

In a rare grant of mandamus in the summary judgment context, the Third Circuit held that a writ of mandamus is a proper remedy when a trial judge arbitrarily refuses to rule on a summary judgment motion.[385] *In **Re** School Asbestos Litigation* involved a nationwide products liability class action suit in which over 30,000 school districts alleged that the defendants were liable for costs associated with eliminating the dangers caused by asbestos-containing products in plaintiffs' school buildings.[386] The defendants moved for summary judgment, but the trial judge refused to rule on the motion because it was untimely, even though the judge had neither fixed a deadline for such a motion nor established a firm trial date.[387]

The Third Circuit held that a writ of mandamus is a proper

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[381]*Id.*; *Allied Chem. Corp.*, 449 U.S. at 35; *Kerr*, 426 U.S. at 402. The Ninth Circuit lists the following "guidelines" for determining entitlement to a writ of mandamus: "(1) whether petitioner has no other adequate means, such as direct appeal, to obtain the requested relief; (2) whether petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." Weber v. United States Dist. Court for the Cent. Dist. of Cal., 9 F.3d 76, 78 (9th Cir. 1993); Star Editorial v. United States Dist. Court for the Cent. Dist. of Cal., 7 F.3d 865, 859 (9th Cir. 1993). The Sixth Circuit has adopted this analysis. *In re* NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993); *see also* U.A.W. v. National Caucus of Labor Comm., 525 F.2d 323, 325 (2d Cir. 1975)(" 'usurpation of power, clear abuse of discretion and the presence of an issue of first impression.'") (citation omitted).

[382]*In re* Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993) (citations omitted).

[383]Communication Workers of America v. American Telephone and Telegraph Co., 932 F.2d 199, 208 (3d Cir. 1991). Merely establishing an "error of law," standing alone, does not satisfy this burden. *NLO, Znc.*, 5 F.3d at 156.

[384]*Communication Workers*, 932 F.2d at 208.

[385]*In re* School Asbestos Litig., 977 F.2d 764, 792 (3d Cir. 1992); *cf.* Kershaw v. Shalala, 9 F.3d 11, 15 (5th Cir. 1993) ("When a district court for a legally erroneous reason refuses to act on a matter properly before it, mandamus is generally the appropriate remedy.").

[386]*School Asbestos*, 977 F.2d at 769.

[387]*Id.* at 770.

means to force a district court to consider the merits of a summary judgment motion when it previously has refused to do so.[388] The Third Circuit opined that a district court's failure to consider the merits of a motion for summary judgment when it had a duty to do so was an improper failure to exercise its authority.[389] Significantly, however, the Third Circuit limited its holding to petitions for mandamus that "do not request us to review the *merits* of the motions for summary judgment, but only their timeliness."[390]

While mandamus may be available to compel a judge to rule on a motion for summary judgment, mandamus is an inadequate means to challenge the denial of a motion for summary judgment. Granting the writ is in the appellate court's discretion. Additionally, courts traditionally have been reluctant to issue a writ of mandamus even when the courts believed that they were empowered to do so.[391]

In the summary judgment denial context, courts have denied the writ on a number of grounds. Courts hold that the party may pursue an appeal of the denial,[392] or that such writs are reserved for extraordinary circumstances and "a garden variety denial of summary judgment motion on the ground that there is a genuine issue as to a material fact" does not rise to this level.[393] Uniformly, courts hold that writs of mandamus may not be used as a substitute for appeal,[394] "even though hardship may result from delay and perhaps unnecessary trial."[395] That the moving party must bear the inherent costs of litigation—the primary adverse consequence of an improperly denied motion for summary judgment[396]—does not, by itself, justify the issuance of a writ.[397]

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[388] *Id.*

[389] *Id.* at 793.

[390] *Id.* at 792 (emphasis added).

[391] Moore, supra note 373, at 854.

[392] Communications Workers of America v. American Telephone and Telegraph Co., 932 F.2d 199, 210 (3d Cir. 1991).

[393] Chappell & Co. v. Frankel, 367 F.2d 197, 199-200 (2d Cir. 1966).

[394] United States v. Victoria-21, 3 F.3d 571, 575 (2d Cir. 1993); In *re* School Asbestos Litig., 977 F.2d 764, 772 (3d Cir. 1992); 32 AM. JUR. 2D Federal Practice and Procedure § 259 (1982) (citations omitted).

[395] Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

[396] *School Asbestos*, 977 F.2d at 793 ("the chief harm to the unsuccessful moving party is that it must bear the expense of going to trial").

[397] Communications Workers of America v. American Telephone and Telegraph Co., 932 F.2d 199, 210 (3d Cir. 1991); *see* also Moore, supra note 373, at 844-45 ("mandamus is not available simply because adherence to the final judgment rule would cause inconvenience, cost, or other hardship to the litigants"); 32 AM. JUR. 2D Federal Practice and Procedure § 258 (1982) (unnecessary trials and hardships associated with delay do not justify mandamus).

D. The Collateral Order Doctrine

In *Cohen v. Beneficial Industrial Loan Corp.*,[398] the Supreme Court enunciated a narrow exception to the final decision rule found at 28 U.S.C. § 1291. *Cohen* involved a stockholder's derivative action against the Beneficial Industrial Loan Corporation and several of its managers and directors.[399] The complaint alleged that the individual defendants had conspired to defraud the corporation over an eighteen-year period, allegedly wasting or diverting in excess of $100,000,000.[400]

Pursuant to a New Jersey statute, the defendants moved to require the plaintiff to post a $125,000 bond as security for reasonable expenses and attorney's fees in the event the plaintiff lost the case.[401] The district court refused to grant the motion, believing that the state statute did not apply to an action pending in federal court.[402] The court of appeals disagreed and reversed. The Supreme Court granted certiorari to determine whether the district court's order refusing to apply the state statute was an appealable order.[403]

As an exception to § 1291's final decision rule, the Court recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[404] These decisions are treated as final judgments even though they do not end the litigation on the merits.[405] The Court held that the district court's order was appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[406]

Under *Cohen* and its progeny, to come within the collateral order exception the order must satisfy three elements: '"[Tlhe order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judg-

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398337 U.S. 541 (1949).

399*Id.* at 543.

400*Id.*

401*Id.* at 544-45.

402*Id.* at 545.

403*Id.*

404*Id.* at 546.

405Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

406Cohen v. Beneficial Industrial Loan *Corp.*, 337 U.S. 541, 546-47 (1949).

ment.'"[407] Unless all three elements are satisfied, the appellate court is without jurisdiction to review the order.[408]

Using this test, the Court has permitted appeals prior to criminal trials when the defendant alleged double jeopardy or a violation of the constitutional right to bail[409] because each case "'involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'"[410] Similarly, in civil cases, the Court has permitted the immediate appeal of a district court's denial of a motion to dismiss based on a claim of absolute immunity because "'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."[411]

To be eligible for interlocutory review, the district court's order denying a claimed right must effectively "'render impossible any review whatsoever.'"[412] **An** order is effectively unreviewable "only 'when the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'"[413] Accordingly, the Court has denied immediate review of pretrial discovery orders under the rationale that such orders may be appealed after final judgment or "in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of

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[407] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (citations omitted); *see also* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988); *Midland Asphalt Corp.*, 489 U.S. at 799; Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992); Manion v. Evans, 986 F.2d 1036, 1038 (6th Cir. 1993); EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 1993). Some courts also require that petitioners meet a fourth requirement: "the presentation of a serious and unsettled question of law." Marler v. Adonis Health Prod., 997 F.2d 1141, 1142 (5th Cir. 1993).

[408] *Gulfstream,* 485 U.S. at 276; Boughton v. Cotter Corp., 10 F.3d 746, 749 (10th Cir. 1993).

[409] *Risjord*, 449 U.S. at 376-77 (citing Abney v. United States, 431 U.S. 651 (1977); Stack v. Boyle, 342 U.S. 1 (1951)); *see also* Helstoski **v.** Meanor, 442 U.S. 500 (1979) (motions to dismiss under the Speech or Debate Clause).

[410] *Risjord*, 449 U.S. at 377 (citation omitted).

[411] *Chasser*, 490 *U.S.* at 499-500 (citations omitted). The Court also has permitted claims of qualified immunity to be pursued by immediate appeal because such immunity is viewed as "'an immunity from suit.'" *Id.* (citation omitted). *See also* Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 687 (1993) ("orders denying individual officials' claims of absolute and qualified immunity are among those that fall within the ambit of *Cohen.")*

[412] *Risjord*, 449 *U.S.* at 376 (citation omitted).

[413] *Chasser,* 490 U.S. at 498-99 (citation omitted); *see also* Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989).

the contempt ruling."[414] In Firestone *Tire* & Rubber Co. *v.* Risjord, the Supreme Court held that an order refusing to disqualify counsel was not immediately appealable because the petitioner failed to establish "that its opportunity for meaningful review will perish unless immediate appeal is permitted."[415]

In Chappell *&* Co. *v. Frankel,*[416] the Second Circuit directly addressed the issue whether a court of appeals had jurisdiction to review the denial of summary judgment based on the collateral order doctrine. In Chappell, the plaintiffs filed a copyright infringement suit alleging that the defendant corporations were manufacturing and selling certain phonograph records illegally.[417] The defendant sought summary judgment on the basis that the corporations had been licensed to manufacture and sell the phonograph records containing the compositions allegedly subject to plaintiffs' copyrights.[418]

The district court denied summary judgment, finding a genuine issue whether the defendant had been issued licenses for the disputed musical compositions.[419] After a three-judge panel from the Second Circuit affirmed the denial, the Second Circuit, acting en banc, agreed to consider the issue and unanimously affirmed.[420]

As a preliminary matter, the Second Circuit noted that it was beyond dispute that an order denying a motion for summary judgment was not a final decision within the meaning of 28 U.S.C. § 1291.[421] Further, the Second Circuit rejected the application of the collateral order doctrine because the denial "was directly concerned with the merits of [the defendant's] substantive claim for relief . . . ."[422]

The only orders that the Supreme Court has found to satisfy the collateral order doctrine are those orders involving a right that will be " 'irretrievably lost' " if not immediately appealed, such as immunity from suit.[423] A right that equates with a mere defense to

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[414] *Risjord*, 449 U.S. at 377 (citation omitted).

[415] *Id.*; ***see*** *also* Richardson-Merrill, Inc. v. Koller, 472 U.S. 424, 431 (1984) tin *Risjord,* Court "refused to permit an interlocutory appeal because it found an order denying disqualification to be reviewable on appeal after a final judgment").

[416] 367 F.2d 197 (2d Cir. 1966).

[417] *Id.* at 198.

[418] *Id.* at 199.

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] Martineau, *supra* note 363, at 742; ***see*** Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) (Eleventh Amendment immunity from suit).

liability, rather than an immunity from suit, does not suffice.[424] Even if the litigation is determined to be ultimately unnecessary, the trouble and expense of litigation does not qualify an order as collateral and appealable.[425] To be appealable, the order must threaten a legal right with irreparable harm.[426]

E. Summary: Inadequate Mechanism for Relief

Requiring a moving party—who believes that it is entitled to summary judgment—to wait until trial to renew a motion for summary judgment through the medium of a motion for judgment as a matter of law, and appellate review of that motion if denied, is clearly unjust[427] and requires correction. Under this remedial scheme, a party who should not be going to trial at all must suffer the cost, inconvenience, and risk associated with preparing for and litigating the case. Rather than bearing the burden of continued litigation, the nonmoving party may be forced to settle a case in which it has committed no legal wrongdoing. This scheme permits a district court judge to circumvent FRCP 56's requirement with impunity.

The current mechanisms for appellate review of erroneous summary judgment denials are inadequate. Section 1292(b) fails because it affords too much discretion to the district court to refuse certification for appellate review.[428] Further, a district court's denial of a motion for summary judgment based on a misperceived genuine issue of material fact is unlikely to qualify as a controlling question of law as to which there is substantial ground for difference of opinion.[429] The collateral order doctrine is unsatisfactory because of its narrow application to those orders qualifying as collateral and for

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[424] *Metcalf & Eddy, Znc.,* 113 S. Ct. at 687.

[425] *Id.*

[426] *Id.*

[427] Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992) (suffers injustice); Jarrett v. Epperly, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990) (unjust even if jury ultimately decides in the movant's favor); Locricchio v. Legal Serv. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987) ("party moving for summary judgment suffers an injustice if his motion is improperly denied").

[428] Martineau, *supra* note 363, at 767-68.

[429] *See* Chappell & Co. v. Frankel, 367 F.2d 197, 200 n.4 (2d Cir. 1966).

[430] *Id.* Since 1978, the Supreme Court has interpreted the collateral order doctrine narrowly. *Id.* at 740-41; Joseph G. Matye, *Interlocutory Appeals Of Rule 35 Medical Examination Orders,* 61 UMKC L. REV. 503, 533 n.231 (1993) ("availability is limited due to the restrictions placed on its use by the Supreme Court"); Solimine, *supra* note 364, at 1171 (narrow construction).

which delayed review would cause irreparable harm.[430] Further, mandamus is a disfavored remedy that rarely is granted even when a petitioner has established its entitlement to such relief.[431]

VI. A Modest Proposal: Permit Immediate Appeals

A. *Extend the Cohen Exception*

Although current collateral order doctrine precedent does not favor appellate review of summary judgment denials, the Supreme Court easily could extend the doctrine to permit such appeals.

1. The First Prong of the Cohen *Test—To* satisfy the first prong of the *Cohen* test, the order denying a motion for summary judgment must '"conclusively determine the disputed question."'[432] However, since rendering its decision in *Cohen,* the Court has elaborated on the test's first prong. In *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.,*[433] the Court distinguished between orders that were "inherently tentative" and those "that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed.'"[434] Inherently tentative orders are those "as to which some revision might *reasonably* be expected."[435]

In one respect, a summary judgment denial does not satisfy the test's first prong because the moving party still may succeed in proving its version of the facts at trial.[436] Further, the trial judge always retains the authority to revise the order denying summary judgment sua sponte or after a second motion is filed.[437]

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[431] *See* supra notes 373-96 and accompanying text; ***see*** also Martineau, supra note 363, at 768 ("mandamus provides a weak exception to the final judgment rule because of the limitations placed on its use by the Supreme Court"); *id.* at 747 ("restrictivetrend of the Supreme Court decisions").

[432] Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (19891.

[433] 460 U.S. 1 (1983) (an order granting a stay of litigation in federal court is not an inherently tentative order).

[434] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (citing Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 n.14 (1983)).

[435] *Moses H. Cone* Memorial *Hosp.,* 460 U.S. at 12 n.14 (emphasis added).

[436] *Cf.* Mitchell v. Forsyth, 472 U.S. 511, 527 (1985). The denial of a motion for summary judgment based on the ground of qualified immunity is conclusive because it represents the court's conclusion that even if the facts are taken as true, the defendant is still not entitled to qualified immunity. *Id.* That the moving party will be able to alter the district court's conclusion by going to trial is unlikely. *Id.*

[437] Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990); ***see*** also supra notes 333-36 and accompanying text.

If viewed from a different perspective, the denial of summary judgment "finally and conclusively determines the [moving party's] claim of right not to *stand trial* on the [opposing party's] allegations."[438] Unless the moving party assumes the unnecessary burden of presenting further evidence to the court negating the opposing party's claim or defense,[439] it is unlikely that the district court will reverse itself and grant summary judgment. Because no further steps exist that the moving party may realistically take to avoid trial, the *Cohen* test's threshold requirement of a fully consummated decision is satisfied.[440] Further, when the moving party actually litigates and loses a trial on the merits, it has *no* avenue of relief to challenge the denied motion.[441]

Additionally, that a district court judge will, *sua sponte*, reverse the prior order denying summary judgment is extremely unlikely. Unless the moving party discovers additional, persuasive evidence prior to trial, a second attempt at summary judgment would be futile. The mere existence of a remote possibility of revision does not render the denial order inherently tentative.[442] Realistically, a district court's order denying a motion for summary judgment is not an inherently tentative order; it is the final word on the issue.

2. The Second Prong of the Cohen *Test—The* second portion of the *Cohen* test requires that the order resolve "an important issue completely separate from the merits of the action . . . ."[443] Granting a motion for summary judgment involves an adjudication on the merits[444] and, at first glance, a denial of summary judgment would

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[438] *Mitchell,* 472 U.S. at 527; see Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982) ("While summary judgment often is inappropriate to dispose of cases involving issues of intent and motive, the moving party has the *right to* judgment *without* the *expense of a trial* when there are no issues of fact left for the trier of fact to determine.") (emphasis added).

[439] The movant is not required to negate the nonmoving party's claim or defense. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[440] *Mitchell,* 472 U.S. at 527 (citing Abney v. United States, 431 U.S. 651, 659 (1977)).

[441] *See* supra note 26.

[442] *Cf.* Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12 n.14 (1983) ("as Rule 54(b) provides, virtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders 'inherently tentative'. . . .") (citation omitted).

[443] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

[444] Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) ("a grant of summary judgment is a decision on the merits . . . ."); Southeast Bank v. Gold Coast Graphics Group, 149 F.R.D. 681, 683 (S.D. Fla. 1993) ("the granting of summary judgment is a disposition on the merits of the case . . . .").

seem to fail this portion of the Cohen test. The Second Circuit took this position in Chappell *& Co. v. Frankel.*[445]

However, a court's determination that FRCP 56's legal requirements have not been satisfied conceptually is distinct from the merits of the parties' claims. Indeed, in Switzerland Cheese Ass'n, Inc. *v. E.* Horne's Market, *Inc.,*[446] the Supreme Court stated broadly that "the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim."[447] The denial simply is a pretrial order determining that the case should go to trial.[448]

When reviewing a motion for summary judgment, the trial judge makes a determination whether the moving party is entitled to summary judgment as a "matter of law."[449] It is not the judge's function to weigh the evidence and determine the truth of the matter.[450] The judge merely determines whether there is a genuine issue for trial.[451] Indeed, in making this determination, the judge must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor.[452] In essence, the trial judge does not delve into the merits of the case; he or she merely makes the legal determination whether, based on the available record, an issue exists that needs to be determined at trial. Federal Rule of Civil Procedure **56** requires a judge to "examine the legal significance of the undisputed facts in order to

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[445]367 F.2d 197 (2d Cir. 1966). Specifically, the Second Circuit stated: "the lower court's denial of appellant's motion for summary judgment was directly concerned with the merits of appellant's substantive claim for relief and thus cannot be brought within the judicially created exception to the final decision rule, which permits appeal from 'collateral' orders . . . ." *Id.* at 199.

[446]385 U.S. 23 (1966).

[447]*Id.* at **25;** *accord* Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), *cert. dismissed,* **479** U.S. 1072 (1987). In *Switzerland Cheese,* the Court addressed the question whether the district court's order denying an injunction was interlocutory within the meaning of 28 U.S.C. § 1292(a)(1) because the motion for summary judgment served as a motion for an injunction. *Switzerland Cheese,* 385 U.S. at 24. Courts of appeal have jurisdiction over interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions. 28 U.S.C. § 1292(a)(1) (1988).

[448]*Switzerland Cheese,* 385 U.S. at 25.

[449]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); *In re Hastie,* **2** F.3d 1042, 1044 (10th Cir. 1993).

[450]*Liberty Lobby,* 477 U.S. at 249; Thrasher v. B & B Chemical Co., 2 F.3d 995, 996 (10th Cir. 1993); Suggs v. Pan American Life Ins. Co., 847 F. Supp. 1324, 1329 (S.D. Miss. 1994).

[451]*Liberty Lobby,* 477 U.S. at 249; *Thrasher,* 2 F.3d at 996; *Suggs,* 847 F. Supp. at 1329.

[452]*Liberty Lobby,* 477 U.S. at 255; *see also* Greenberg v. F.D.I.C., 835 F. Supp. *55,* 56 (D. Mass. 1993) ("the Court reviews the facts in the light most favorable to the non-moving party").

determine whether they establish that 'the moving party is entitled to judgment as a matter of law.'"[453]

3. The Third Prong of the Cohen Test—The improper denial of a motion for summary judgment denies the moving party its right not to stand trial when the requirements of Rule ***56*** have been satisfied. In certain contexts, a right not to stand trial will satisfy the third prong of the Cohen test.[454] However, whether this particular right to avoid trial is the type of right envisioned under Cohen and its progeny is uncertain. Theoretically, any litigant who has "a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial," but not all such rights fall within the "narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal."[455]

The Supreme Court has held that an order denying absolute or qualified immunity is immediately appealable because the essential attribute of the immunity defense is the right " 'not to stand trial under certain circumstances' and thus is 'an immunity from suit rather than a mere defense to liability.' "[456] In a similar vein, some courts have held that appellate jurisdiction exists over denied motions for summary judgments that are based on a prior release from liability, either in the form of a general release by a terminated employee or a settlement agreement of ongoing litigation.[457] To meet the Cohen requirements, these courts have characterized such releases as creating "not only a defense to liability but also an immunity from trial."[458]

In Midland Asphalt Corp. *v.* United States, the Supreme Court —in a criminal case—narrowly construed the third prong of the Cohen test with regard to the right not to stand trial. The Court observed that a party could argue that "any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss . . . or terminate the trial."[459] However,

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[453]SINCLAIR, *supra* note 38, § 8.14, at 439-40; **see** *also* First of America Bank—West Michigan v. ALT, 848 F. Supp. 1343, 1347 (W.D. Mich. 1993) ("court must make purely legal judgments that go to the nature and sufficiency of the complaint as well as the evidence put forward to support it").

[454]Midland Asphalt Corp. v. United States, 489 U.S. 794, 800-01 (1989)("deprivation of the right not to be tried satisfies the . . . requirement of being 'effectively unreviewable on appeal from a final judgment.' ") (citation omitted)).

[455]Van Cauwenberghe v. Baird, 486 U.S. 517,524 (1988)

[456]*Baird*, 486 U.S. at 523 (citing Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985)).

[457]Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992) (citing Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991); Janneh v. GAF Corp., 887 F.2d 432 (2d Cir. 1989), ***cert. denied,*** 111 S. Ct. 177 (1990))

[458]*Chaput*, 964 F.2d at 1301.

[459]Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989).

such a broad application of the right does not satisfy the requirements for the collateral order doctrine exception to the final judgment rule.[460] The Court opined that there exists a "'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'"[461] Accordingly, the Court limited the right not to stand trial for purposes of the *Cohen* test to cases where there exists an "explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause . . . or the Speech or Debate Clause . . . ."[462]

While the Supreme Court's stringent requirement in *Midland Asphalt Corp.*, that there be an explicit statutory or constitutional basis for the right not to stand trial, should be limited to the criminal context,[463] the decision is a warning from the Court that lower courts must exercise restraint when determining whether a legal right includes protection from the exigencies of trial.[464] Regardless, in the civil context a party must establish at a minimum that the " 'essence' of the claimed right is a right not to stand trial;' "[465] it is a right "to avoid suit altogether."[466]

Although the gravamen of the right to summary judgment is an entitlement not to stand trial because the moving party is entitled to judgment as a matter of law, the narrow scope of the collateral order doctrine does not appear currently to embrace the erroneous denial of a summary judgment motion. As an illustration, in *Van Cauwenberghe v. Biard,*[467] the Court held that the denial of a motion to dismiss based on an extradited defendant's immunity from civil process was not immediately appealable because the "right not to be burdened with a civil trial itself is not an essential aspect of this protection."[468]

The most notable consequence of a summary judgment denial is that the moving party must bear the cost and inconvenience of litigation. As a general rule, however, the courts have held

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[460] *Id.*

[461] *Id.* (citing United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982)).

[462] *Id.*

[463] In a subsequent decision, the Court appeared *to* limit this requirement to "cases involving criminal prosecutions . . . ." Lauro Lines S.R.L. v. Chasser, 490 U.S. 495,499 (1989).

[464] Manion v. Evans, 986 F.2d 1036, 1039 (6th Cir. 19931.

[465] *Chasser,* 490 U.S. at 500.

[466] *Id.*

[467] 486 U.S. 517 (1988).

[468] *Id.*; ***see*** *also* Manion v. Evans, 986 F.2d 1036, 1039 (6th Cir. 1993).

that the burden and expense of unnecessary litigation is insufficient to warrant an immediate appeal of a pretrial order."[469]

The Supreme Court could easily extend the collateral order doctrine's third prong to embrace summary judgment denials by focusing on the litigant's right not to stand trial that is lost, rather than the financial consequences of the denial. Summary judgment entails some form of a right not to be subjected to a trial on the merits.[470] While this right does not rise to the level of a constitutional or statutory right, it is not a right without significant importance. The Judicial Conference of the United States, the Supreme Court of the United States, and Congress approved FRCP 56;[471] and it enjoys the force and effect of law.[472]

In other contexts, courts permit immediate appeal under the collateral order doctrine of decisions that do not deny a constitutional or statutory right. As an illustration, neither the Constitution nor any statute require the appointment of counsel in a civil case.[473] Moreover, no statute specifically authorizes the appeal of a decision denying appointment of counsel.[474] Nevertheless, four circuits permit immediate appeal under the collateral order doctrine of such denials,[475] emphasizing the hardship, injustice, or irreparable prejudice that may result from an erroneous denial of a motion to appoint counsel.[476]

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[469] *Chasser*, 490 U.S. at 499; *see also* EDS Adjusters, Inc. v. Computer Sciences Corp., 149 F.R.D. 86, 89 (E.D. Pa. 1993) ("the cost associated with additional litigation does not justify setting aside the finality requirement of § 1291."). *But cf.* Chaput v. Unisys Corp., 964 F.2d 1299, 1301 (2d Cir. 1992) ("we may have jurisdiction on the ground that a release from liability protects the released party from the distractions and expenses of a trial as well as from further monetary liability").

[470] Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982) ("While summary judgment often is inappropriate to dispose of cases involving issues of intent and motive, the moving party has the *right to judgment without the expense of a trial* when there are no issues of fact left for the trier of fact to determine.") (emphasis added); SINCLAIR, *supra* note 38, § 8.14, at 436 ("In 1986 the Supreme Court established summary judgment standards that were "designed to balance the right of nonmoving party to receive a jury trial against the movant's *right to be free from the burdens of needless litigation.")* (emphasis added).

[471] Umbenhauer v. Woog, 969 F.2d 25, 32 (3d Cir. 1992).

[472] Fairhead v. Deleuw, Cather & Co., 817 F.2d 153, 155 (D.C. Cir. 1993); Dean v. Veterans Admin. Regional Office, 151 F.R.D. 83, 84 (N.D. Ohio 1993).

[473] Jeffrey D. Hanslick, *Decisions Denying the Appointment of Counsel and the Final Judgment Rule in Civil Rights Litigation*, 86 NW. U. L. REV. 782, 783 (1992). Two statutes, 28 U.S.C. § 1915(d) and 42 U.S.C. § 2000e-5(f)(1), provide that a court may appoint a counsel for a party in a civil case. *Id.*

[474] *Id.*

[475] *Id.* at 787. The Federal, Fifth, Eighth and Ninth Circuits permit appeals; while the First, Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits hold that decisions denying appointment of counsel do not satisfy the requirements of the collateral order doctrine. *Id.* at 787-88 (citations omitted).

[476] *Id.* at *788* (citations omitted).

B. Create a New Rule for Interlocutory Appeal

The *Federal Rules of Civil Procedure* were designed to "secure the just, speedy, and inexpensive determination of every action."[477] Permitting immediate appeals of summary judgment motions would further this goal in cases where such motions are improperly denied.[478] Litigants would not be required to suffer the delay and expense associated with preparing for trial when they are clearly entitled to summary judgment. Further, an unsuccessful moving party would be afforded an avenue to challenge threats of protracted and expensive litigation used to coerce settlement.[479]

The primary policy reason supporting the general rule against interlocutory appeals of nonfinal orders is to avoid piecemeal appeals.[480] The courts are willing to accept infliction of some degree of harm on a litigant to satisfy the need for efficient judicial administration and to avoid the delay and burden associated with piecemeal review of a district court's decisions.[481]

Permitting interlocutory appeal of an order denying a motion for summary judgment does not constitute piecemeal review of a district court's decision because, if successful, the appealing party would be entitled to a final and complete resolution of the case on the merits through the grant of its requested motion for summary judgment. Theoretically, if an appellate court were to reverse such a denial, determining that as a matter of law the moving party was entitled to judgment, on remand the district court would perform no function beyond granting the motion and ending the case.[482]

Recently, Congress has provided the Supreme Court with the authority to prescribe rules both defining when an order is final for purposes of **28** U.S.C. § 1291, and determining when an order that

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[477] FED. R. CIV. P. 1

[478] Permitting interlocutory appeals of erroneous summary judgment denials would serve the important policy goals of providing appellate guidance on summary judgment law, censuring unacceptable behavior of trial judges who elect to ignore Rule 56's mandates, and protecting the interests of individual litigants by insuring that they are treated fairly and do not erroneously suffer the unnecessary pressures. costs and delay caused by an improper summary judgment denial. ***See*** Matye, *supra* note 430, at 519.

[479] *Cf.* Limehouse v. Resolution Trust Corp., 862 F. Supp. 97, 102 (D.S.C. 1994) (recognizing the threat of protracted litigation as a means or coercing settlement).

[480] Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 24-25 (1966); EEOC v. Sears, Roebuck & Co., 839 F.2d 303, 353 n.55 (7th Cir. 1988); Clark v. Kraftco Corp., 447 F.2d 933, 936 (2d Cir. 1971).

[481] Boughten v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993).

[482] United States v. United States Gypsum Co., 340 U.S. 76 (1950) (district court may enter summary judgment on remand from Supreme Court when the Court's opinion showed that a party was entitled to judgment as a matter of law)

is not final may nevertheless be appealed under 28 U.S.C. § 1292.[483] Section 315 of the Judicial Improvements Act of 1990[484] gave the Court authority to "define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ."[485] Section 101 of the Federal Courts Administration Act of 1992[486] amended 28 U.S.C. § 1292 to permit the Court to prescribe rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under section 1292.[487]

Other than a desire to implement a recommendation of the Federal Courts Study Committee,[488] the legislative history of these two statutory provisions provides little information on congressional intent in enacting the changes.[489] The Federal Courts Study Committee encouraged the Court to expand the list of interlocutory decisions that may be appealed.[490] By adopting the Committee's recommendation, Congress intended that interlocutory appeals be made more readily available.[491] Further, the language of § 1292(e), which provides for the Court to designate rules permitting interlocutory appeals "not otherwise provided for," indicates that any such rule may enlarge the list of appealable interlocutory orders,

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[483] Matye, *supra* note 430, at 530.

[484] Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C.A. § 2072 (c) (West 1993)).

[485] *Id.* at § 315.

[486] Pub. L. No. 102-572, 106 Stat. 4506 (1992).

[487] *Id.* at § 101 (codified at 28 U.S.C.A. § 1292(e) (West 1993)); *see* Martineau, *supra* note 363, at 718; Matye, *supra* note 430, at 530.

[488] Congress established the Federal Courts Study Committee in 1988 to examine the problems facing the court system, develop a long-range plan for its future, and make recommendations in applicable laws for the improvement of federal courts. Matye, *supra* note 426, at 529-30. The Committee recommended that Congress "consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals." Report of the Federal Courts Study Committee 95 (April 2, 1990), *cited in* Matye, *supra* note 430, at 530.

[489] Matye, *supra* note 430, at 530-31 (citing H.R. REP. No. 1006, 102d Cong., 2d Sess. 12-14 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3921, 3921-23 (accompanying the 1992 legislation); H.R. REP. NO. 734, 101st Cong., 2d Sess. 15-17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861-62 (accompanying the 1990 legislation)).

[490] David D. Siegel, *Commentary on* 1988 *and* 1992 *Amendments, in* 28 U.S.C.A. § 1292, 334, 335 (West 1993). The Committee recommended that the Court "'add to – but not subtract from — the list of categories of interlocutory appeal permitted by Congress' in Section 1292." Matye, *supra* note 430, at 531 (citation omitted).

[491] Matye, *supra* note 430, at 531. The House Report specifically described the legislation "as designed 'to expand the appealability of interlocutory determinations by the courts of appeals.'" Siegel, *supra* note 490, at 335 (citing H.R. NO. 102-1006, pt. 1, at 18 (Oct. 3, 1992)).

but may not curtail it.[492] Significantly, Congress's election to permit interlocutory appeal of denied motions to transfer in Tucker Act litigation strongly suggests that Congress views the waste of time and resources associated with unnecessary litigation—the primary consequence of an improperly denied motion for summary judgment—as a meritorious reason to permit interlocutory appeal of traditionally unappealable nonfinal orders.[493]

Under this new legislation, the Supreme Court may permit interlocutory appeals of summary judgment denials in two ways. First, the Court may designate denial orders as final for purposes of § 1291. This approach would grant the moving party an appeal as of right.[494] The obvious drawback to this approach is the potential for overwhelming an already overburdened[495] appellate court system with appeals. The federal judiciary at all levels has voiced concern about the increasing caseload at the appellate level.[496] Opening the appellate floodgates to appeals of denied summary judgment motions, irrespective of their merit, would generate widespread opposition from the bench and unnecessarily exacerbate the problem of an overburdened appellate judiciary.

The second, and better, approach is to define appealable interlocutory orders under 28 U.S.C. § 1292(e) in such a manner as to permit appeal of the most meritorious denial orders without opening the appellate floodgates. Its new rulemaking authority allows the Court to create interlocutory appeal rules that include discre-

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[492]Siegel, *supra* note 490, at 335; ***see*** *also* Martineau, *supra* note 363, at 772 ("By its terms the amendment expands rather than contracts appealability because it permits additions but not deletions from section 1292.").

[493]Nontort claims against the United States (Tucker Act claims1 for more than $10,000 are within the exclusive jurisdiction of the Claims Court. 28 U.S.C. § 1491 (1988).A party may bring a claim for less than $10,000 to either the Claims Court or the district courts. *Id*. § 1346(1988). If the government believed that the amount of the claim exceeded $10,000, it could file a motion to transfer and cure the jurisdictional defect. Previously, a district court's order denying such a motion was an interlocutory order and not appealable. If after the final judgment, the appellate court reversed the order, the final judgment also was reversed, causing a huge and unnecessary waste of effort and money for both parties. Congress recognized this problem and in the 1988 Amendments to 28 U.S.C. § 1292 added paragraph (4) to § 1292(d), which expressly permits interlocutory appeals of denied motions to transfer. Seigel, *supra* note 490, at 334-35.

[494]Matye, *supra* note 430, at 532.

[495]The Federal Courts Study Committee reported that in the last three decades, the number of appeals has multiplied fifteen-fold, while the number of appellate judges has only trebled. Martineau, *supra* note 363, at 719 n.9 (citation omitted).

[496]*See* Solimine, *supra* note 364, at 1166 & n.1 (citations omitted).

tionary conditions like those found in section 1292(b) or like those seen when seeking a writ of mandamus.[497]

Assuming that the Court were to permit some form of discretionary review of summary judgment denials, a limited number of potential schemes are available to accomplish interlocutory review:

> "(1) Review initiated by a party, directly to the appellate court, with appellate court option to accept . . .;
>
> . . . .
>
> **(2)** Review initiated by a party, requiring trial judge concurrence, and with appellate court option to accept . . .;
>
> **(3)** Review initiated by a party, requiring trial judge concurrence, but without appellate court option to accept. . . ."[498]

The second and third options are inadequate because they require the trial judge to be objective about the wisdom of his or her own denial order.[499] Particularly when the trial judge has denied summary judgment for subjective reasons (e.g., individual notions of justice) it is extremely unlikely that the trial judge would concur in the appeal. Practically speaking, these two options would not provide an additional avenue of relief to the unsuccessful moving party.

The first option maintains a proper balance between avoiding burdensome appeals with affording justice to a litigant, who has satisfied FRCP 56's requirements and is entitled to judgment as a matter of law. The aggrieved party has an avenue of immediate appeal to challenge a clearly erroneous summary judgment denial order and the court of appeals retains the means to screen nonmeritorious appeals.

Because of this screening mechanism, circuit courts would act as their own gatekeepers and these courts would see only a modest increase in their appellate caseload. Arguably, if the ability to

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[497] Matye, *supra* note 430, at 532; Thomas D. Rowe, *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution"*, **54** U. PITT. L. REV. 795, 798 (1993). *Contra* Martineau, *supra* note 363, at 772 n.333 (nothing in Committee's report or the legislative history suggests that the court has this power). An option permitting review as a matter of right would cause undue burdens on courts of appeals. Matye, *supra* note 430, at 533.

[498] Matye, *supra* note 430, at 532 (citing Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. **WASH.** L. REV. 1165, 1183 (1990)). Matye lists an additional potential scheme for interlocutory review: "Review initiated by a party, directly to the appellate court, without appellate court option (*e.g.*, collateral orders)." Matye, *supra*. However, this scheme has been discussed previously. *See infra* section IV(A).

[499] Matye, *supra* note 430, at 533.

appeal an improper summary judgment denial causes an increase in the number of motions for summary judgments granted, then the concomitant reduction in the federal court caseload could lead potentially to a decrease in the overall number of appeals.[500] Federal district court judges would be encouraged to grant summary judgment motions when clearly warranted rather than risk reversal at the appellate court level.

Because the availability of such an appeal would discourage improper summary judgment denials by providing a means of challenging them, litigants would see cases terminated earlier and more often at the district court level. This increase in the number of cases subject to early termination would serve important public policy goals. The ripple effect of the increased number of orders granting summary judgment would include a reduction in the amount of judicial resources consumed as fewer cases proceed to trial. Additionally, litigants would benefit by the reduced expenditure of time, money, and effort required to obtain an adjudication of the controversy giving rise to the lawsuit.

Permitting interlocutory appeal of an improperly denied motion for summary judgment would increase satisfaction with, and respect for, the judicial system by both litigants and their attorneys. Litigants who have been unjustly treated by the judicial system may now obtain a fair, less expensive, and expeditious means of determining their legal rights short of protracted litigation. Conversely, the party who has survived summary judgment, when it should not have done so, will be disappointed with a reversal of the district court's denial order, but it cannot claim that it has suffered from any form of injustice.

VII. Conclusion

The Supreme Court's decisions in *Matsushita, Celotex,* and *Liberty Lobby* encouraged lower courts to use FRCP **56** as a means of disposing of factually unsupported cases prior to trial. The Court clarified the law in this area and held out summary judgment as a useful—if not favored—procedural device for resolving litigation in a just, speedy, and inexpensive manner. A court should not deny a properly supported motion for summary judgment either because the case involves complex issues of fact or law or because the litigation embraces issues of intent or motivation. Further, the Court has indicated that once a moving party has satisfied FRCP 56's requirements, summary judgment is mandated. The district court judge

[500] *Cf.* Solimine, *supra* note **364,** at **1178.**

must enter summary judgment; he or she is without discretion to act othenvise.

As with all *Federal Rules of Civil Procedure,* parties to a lawsuit are entitled to rely on FRCP **56** and federal district court judges are obligated to follow it. These rules have the force and effect of law.[501] Judges do not "possess the authority to circumvent, ignore or deviate from the *Federal Rules of Civil Procedure,* which were approved by the Judicial Conference of the United States, the Supreme Court of the United States, and Congress."[502]

Unfortunately, not all district court judges understand or adhere to the precepts governing summary judgment. Further, despite the importance of FRCP **56** and the Supreme Court's emphasis on summary procedure, the legal system has failed to provide an adequate mechanism by which a party erroneously denied a properly supported motion for summary judgment may seek relief. This deficiency in the legal system subjects litigants to unnecessary delay and expense, and exacerbates the problems of an already overburdened judicial system. **A** defendant must elect between settling a case in which it is not liable or assume the costs and risks of defending itself at trial before an unpredictable judge or jury. Even if successful, the defendant's financial expenditures associated with the judicial success may render such triumph a pyrrhic victory.

The solution to the problem of improperly denied motions for summary judgment is a modest one in the sense that it requires little effort to solve the problem and the consequences of the solution will have a minimally adverse impact, if any, on judicial resources. However, providing a limited avenue of relief will correct an injustice in the legal system, add teeth to FRCP **56,** and effectuate the fundamental purpose of the Federal Rules " 'to secure the just, speedy and inexpensive determination of every action.' "[503]

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[501] Fairhead v. Deleuw, Cather & Co., 817 F.2d 153, 155 (D.C. Cir. 1993); Dean v. Veterans Admin. Regional Office, 151 F.R.D. 83, 84 (N.D. Ohio 1993).

[502] Umbenhauer v. Woog, 969 F.2d 25, 32 (3d Cir. 1992).

[503] *See supra* note 1.

THE DAVIS-BACONAND SERVICE CONTRACT ACTS: LAWS WHOSE TIME HAS PASSED?

MAJOR TIMOTHY J. PENDOLINO*

I. Introduction

> *"Mr. Speaker, if this bill were not demanded by organized labor, it would not have a chance of passage in this House under suspension of the rules. This is the most ridiculous proposition I have ever seen brought before a legislative body."*[1]

In the sixty-three years since Representative Blanton made this statement on the floor of the House of Representatives, the Davis-Bacon Act[2] (DBA, or Act), along with the Service Contract Act[3] (SCA, or Act), continue to be the subjects of periodic debate. These debates generally pit those who believe that the government must act to protect workers from competitive pressures and unscrupulous employers against those who believe in free market forces. The result has been that Democratically controlled Congresses amend the Acts to broaden their coverage and strengthen their controls[4] while Republican Administrations make regulatory changes which have the opposite effect.[5]

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[1] 74 CONG. REC. 6508 (1931) (remarks by Rep. Blanton).

[2] Pub. L. No. 71-798, 46 Stat. 1494 (codified as amended at 40 U.S.C. § 276a (1988)).

[3] Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-357 (1988)).

[4] The DBA has been amended four times since its passage while the SCA has been amended three times, all during periods in which the Democrats were the majority party. These amendments either broadened or strengthened the relevant Act's coverage.

[5] *See, e.g.*, 50 Fed. Reg. 4506 (1985), where the Reagan Administration's Department of Labor (DOL) published a final rule making two changes to DOL regulations implementing the DBA. The first revised 29 C.F.R. § 1.3(d) to prohibit the use of data from DBA-covered projects for certain types of wage determinations. ***See*** *infra* text accompanying note 56. The second changed 29 C.F.R. §1.7(b) to preclude the use of data from metropolitan areas in wage determinations for rural areas.

What are these Acts and what do they do? In very simple terms, Congress provided in both the DBA and SCA that those working on government contracts for construction or services could not be paid less than the wage determined by the Secretary of Labor to be "prevailing" in the locality where the work is to be performed.[6]

The DBA applies to "every contract in excess of $2000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings and public works."[7] The DBA requires that these contracts state:

> the minimum wages to be paid various classes of laborers and mechanics . . . shall be based upon the wages . . . determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which work is to be performed . . . .[8]

The SCA applies to "every contract entered into by the United States or District of Columbia in excess of $2500 . . . the principal purpose of which is to furnish services in the United States through the use of service employees."[9] The SCA requires that these contracts contain "provision[s] specifying the monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor] . . . in accordance with prevailing rates for such employees in the locality."[10] In the case of service employees covered by a collective bargaining agreement, the SCA mandates the payment of wages no less than "the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations."[11]

Both the DBA and the SCA authorize the government to withhold funds owed to a contractor to pay employees who have been paid less than the prescribed prevailing wage.[12] Both Acts also provide that a contractor may be debarred—made ineligible for receipt

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[6] *See* 40 U.S.C. § 276a(a) (1988);41 U.S.C. § 351(a)(1) (1988). The term "prevailing" is defined at 29 C.F.R. § 1.2 (1993) for the DBA and at 29 C.F.R. § 4.51(b) (1993) for the SCA.

[7] 40 U.S.C. § 276a(a) (1988).

[8] *Id.*

[9] 41 U.S.C. § 351(a) (1988).

[10] *Id.*

[11] *Id.*

[12] 40 U.S.C. §§ 276a(a), 276a-2 (1988);41 U.S.C. § 352(a) (1988).

of government contracts—for a period of up to three years if the Secretary of Labor finds that the contractor failed to comply with the Acts' requirements.13

Unfortunately, Congress failed to define key terms such as "prevailing" and "locality." This left to the Secretary of Labor the task of working out the details which would form the very heart of the coverage of both Acts.

Proponents of the DBA and SCA believe that they are necessary to prevent the wages of those working on government contracts from falling to minimum wage levels due to the competitive nature of government procurement, which favors the lowest bidder. These proponents believe that this protection is worth any additional costs that the Acts may impose on taxpayers. Conversely, critics generally dismiss the argument that wages need protection and claim that the DBA and SCA are simply too expensive, in terms of both direct and administrative costs, to justify their continued existence in these days of declining budgets.

Previously, critics of the DBA and SCA have introduced bills in Congress that would repeal one or both of the Acts, or raise the dollar threshold at which the Acts apply.[14] To date, however, supporters of the Acts have succeeded and Congress has not enacted any of these bills.

This article will analyze whether a need for either of these Acts still exists. Section II discusses the background and history of both Acts. Section III provides an overview of the regulations that the DOL has issued to implement and administer the Acts. Section III also discusses the procurement regulations which other executive agencies have issued to guide their contracting personnel in the administration of the DBA and SCA. Section IV examines the bills currently pending before Congress that would repeal or reform the Acts. Finally, Section V discusses the impact of the DBA and SCA, attempts to quantify some of the costs associated with the Acts, and recommends repeal of both Acts. Section V also recommends that, to protect the wages of lower-paid service workers, Congress consider mandating certain changes to procurement regulations.

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[13]40 U.S.C. § 276a-2(a) (1988);41 U.S.C. § 354 (1988).

[14]For example, the Senate version of the National Defense Authorization Act for FY 1987, Pub. L. No. 99-661, included a provision that would have raised the SCA threshold for Department of Defense contracts to $1 million. ***See*** S. REP. NO. 331, 99th Cong., 2d Sess. (1986). In the 102d Congress, opponents of the Acts introduced two bills calling for repeal of the DBA (S. 2868, 102d Cong., 1st Sess. (1991); H.R. REP. NO. 1755, 102d Cong., 1st Sess. (1991) and one calling for repeal of the SCA (H.R. REP. NO. 5787, 102d Cong., 1st Sess. (1991)).For a discussion of the proposals currently before Congress, ***see*** *infra* sect. IV.

11. History

*A. **The** Davis-Bacon Act*

Congress enacted the DBA in 1931 as a precursor to the New Deal legislation. The DBA was the first federal wage law to apply to nongovernment workers.[15] At the time Congress enacted the DBA, the country was in the throes of the Great Depression and work of any kind was scarce. This was especially true in the construction industry. Under these circumstances, nonlocal contractors could import work crews to a job site for two dollars a day, much less than the prevailing rate of three dollars and fifty cents to four dollars a day. These lower wages put even more downward pressure on local wage rates than the Depression. During this period, federal construction was especially important because post offices and Veterans Administration hospitals were just about the only buildings being constructed.[16]

One of the DBA's original sponsors, Representative Bacon, specifically referred to this situation during the 1931 hearings on his bill:

> A practice has been growing up in carrying out the building program where certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, have been going around throughout the country "picking" off a contract here and a contract there and local labor and the local contractors have been standing on the sidelines looking in. Bitterness has been caused in many communities because of this situation. This bill, my friends, is simply to give local labor and the local contractor a fair opportunity to participate in this building program.[17]

However, some evidence suggested that this problem was not as serious as the bill's supporters made it out to be. **A** January 10, 1931 opinion from the Comptroller General of the United States (Comptroller General), submitted for the record during consideration of the bill before Congress, stated that the practice of importing cheap labor did not appear to be widespread.[18] The Comptroller General's study surveyed twenty-six Treasury Department projects

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[15] ARMAND J. THIEBLOT, JR., THE DAVIS-BACON ACT 6 (Labor Relations and Public Policy Series Report No. 10, **1975).**

[16] *Id.* at 7.

1774 CONG. REC, 6510 (1931).

[18] JOHN P. GOULD & GEORGE BITTLINGMAYER, **THE** ECONOMICS OF THE DAVIS-BACON ACT **7-8** (1980).

employing 1724 workers.[19] The study found that 368 of these were from outside the area of the project.[20] Contractors usually employed outside workers in cities such as Boise, Idaho, and Juneau, Alaska, where large supplies of construction workers were not available.[21]

In addition to this most often stated concern, another, less noble, purpose also may have played a part in the passage of the DBA. Representative Allgood put it most bluntly in his remarks on the House floor:

> Reference has been made to a contractor from Alabama who went to New York with bootleg labor. That is a fact. That contractor has cheap colored labor that he transports, and puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.22

It appears from these statements that racial bigotry also may have played a part in the perceived need for the DBA. The argument continues to be made that the DBA has a disproportionately adverse affect on minorities and women.[23]

Whatever the reason behind its enactment, the DBA became law in 1931. The original text of the Act was deceptively simple.[24]

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[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]74 CONG. REC. 6513 (1931).

[23]*See, e.g.*, ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON" ACTS, THE WALSH-HEALEY ACT, AND THE SERVICE CONTRACT ACT 127-28 (Labor Relations and Public Policy Series No. 27, 1986) [hereinafter PREVAILING WAGE LEGISLATION].

[24]Davis-Bacon Act, Pub. L. No. 71-798, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. $ 276a (1988)). The entire substantive portion of the DBA, as originally enacted, read:

> Every contract in excess of $5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wages for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract: *Prouided,* That in case of national emergency, the President is authorized to suspend the provisions of this Act.

However, shortly after the DBA's enactment, several serious problems became apparent. The DBA did not contain any enforcement mechanism, key terms were not defined, and the prevailing rates were not determined conclusively until after contract award. This latter point concerned contractors because the Secretary of Labor could determine the prevailing rate to be higher than that in their bid, with no right to adjustment of the bid price.[25] Because of these problems, Congress amended the DBA in 1935.[26]

In 1941, Congress again amended the DBA to extend the Act's coverage to contracts awarded through other than sealed bidding procedures.[27] Congress amended the DBA a final time in 1965. These amendments expanded the meaning of the term "wage" to include the basic hourly rate of pay plus a number of allowable fringe benefits.[28]

B. The Service Contract Act

Congress enacted the SCA in 1965 to protect the last major group of employees working on government contracts who were not covered by some kind of prevailing or minimum wage standard — service employees.[29] The congressional purpose behind the SCA was

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[25] THIEBLOT *supra* note 15, at 11.

[26] Act of Aug. 30, 1935, Pub. L. No. 74-403, 49 Stat. 1011 (1935). These amendments provided for:

a. Predetermination of prevailing wage rates by the Department of Labor;

b. Weekly payment of wages conforming to the wage rate determination;

c. A government right to terminate the contract and charge completion costs to the terminated contractor for violations of the DBA,

d. A lowering of the DBA threshold from $5000 to $2000; and

e. The following sanctions:

(1) Withholding payments due a contractor who was violating the DBA;

(2) Disbursement of the amount withheld to workers with wage claims; and

(3) A three-year debarment.

[27] Act of Mar. 23, 1941, Pub. L. No. 77-22, 55 Stat. *53;* Act of Aug. 21, 1941, Pub. L. No. 77-241, 55 Stat. 658 (1941) (codified as amended at 40 U.S.C. § 276a-7 (1988)).

[28] Pub. L. No. 88-349, 78 Stat. 238 (1965).

[29] The DBA covers employees working on construction contracts. The Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1988), covers employees working on government supply contracts. Basically, the Walsh-Healey Act makes the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(a) (Supp. IV 1992) and 29 U.S.C. § 207 (1988), respectively, applicable to supply contracts.

much the same as that behind the DBA. The following remarks by Representative Austin J. Murphy[30] from 1990 oversight hearings provide some insight into this purpose:

> The federal government used its enormous procurement power to depress prevailing wage scales which was often the result of religious adherence to a policy of low cost procurement.
>
> . . . .
>
> The Service Contract Act was a bipartisan response to an intolerable situation in which shoddy contractors worked hand in hand with procurement agencies to exploit the most underpaid members of the labor force.[31]

Also instructive are the statements of Mr. Charles Donahue, then Solicitor of Labor, regarding the bill which ultimately became the SCA:

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[30]At this time, Representative Murphy was the Chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor.

[31]*Oversight Hearing on the Federal Service Contract Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 101st Cong., 2d Sess., 4-5 (1990) (statement of Rep. Murphy). Rep. James G. O'Hara, the principal author of the SCA, made the following remarks during 1986 oversight hearings on the SCA:

> The movement toward enactment of the Service Contract Act of 1965 began about twenty years ago, when a number of members, including myself, Senator Pat McNamara, and a bipartisan group of other Members had our attention called to the role played by the Government of the United States, and particularly the procurement offices of the various armed services, in actively depressing wages and working conditions among workers who were already at the bottom of the economic totem pole—workers who largely were performing unskilled or semi-skilled—or at least underpaid—hores for government agencies who had decided, for budgetary reasons to contract out such work, so it would not be covered by Wage Board rate procedures. The technique which the Government used to depress wages and working conditions was to frequently put out for rebidding the contracts some agencies had made for the performance of such services as laundering, contract mail hauling, janitor, porter, and building maintenance services, food services, etc. The repeated reopening of these contracts for new bids had the effect of encouraging contractors to cut wages and depress working conditions, in order to undercut existing contract holders and to give prospective new contractors a competitive edge.

Oversight Hearings on the Service Contract Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 99th Cong., 2d Sess., 7-8 (1986) (statement of James G. O'Hara, former member of Congress) [hereinafter 1986*Hearings]*.

> The principle basic to the Service Contract Act is neither novel nor unique. Its rationale is simply that funds of the Federal Government shall not be used to finance contracts which undercut and depress the wage rate prevailing in a locality or upon which undesirable working conditions obtain. The Government now insists on prevailing wage standards in construction and supply contracts ....[32]

With regard to the coverage of the SCA, Mr. Donahue stated, "Generally speaking, this bill applies to what are ordinarily known as service or blue-collar employees, to janitorial services, to various kinds of maintenance services under Government service contracts ... guards are also covered under this proposal."[33]

The DOL began to experience problems in administering the SCA almost immediately. These problems primarily were due to difficulties in defining the locality on which prevailing rates would be based and in determining the types of employees to whom those rates would apply.[34]

As a result of oversight hearings held in 1971, the Special Subcommittee on Labor of the House Committee on Education and Labor identified five major problems with the administration of the SCA.[35]

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[32] *Service Contract Act of 1965: Hearings on H.R. 10238 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 89th Cong., 1st Sess., 5 (1965) (statement of Mr. Charles Donahue, Solicitor of Labor). Mr. Donahue also stated:

> contracting agencies must, in the absence of statutory authority, award contracts to the lowest bidder who can satisfactorily complete the work. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it difficult—if not impossible—to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level.
>
> There is the possibility also that under the pressure of bid competition an ordinarily fair contractor may reduce the wages of employees in order to improve the chances that his bid will be accepted. This action, of course, would further depress wage rates. When, as at present, a low bid award policy on service contracts is coupled with a policy of no labor standards protection, the trend may well be in certain areas for wage rates to spiral downward.

[33] *Id.* at 9.

[34] PREVAILING WAGE LEGISLATION, *supra* note 23, at 237.

[35] SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, 94TH CONG., 1ST SESS., CONGRESSIONAL OVERSIGHT HEARINGS: THE PLIGHT OF THE SERVICE WORKER REVISITED 3 (Comm. Print 1975). The five major problems were as follows:

During 1986 hearings, former Representative James G. O'Hara highlighted the situation at Laredo Air Force Base, Texas, which the subcommittee considered during 1971 oversight hearings:

> [T]here emerged a practice by which the Air Force reopened contract bidding annually and timed its request for bids so that the perfectly proper arms-length labor negotiations between the workers and one service contractor, resulting in prospective wage increases for the employees, were persistently disregarded in the bidding conditions under which the next contractor got the job. By juggling contractors, and playing games with the "prevailing wage" language of the Service Contract Act, the Air Force was able to freeze the wages of employees at levels at or near the minimum wage, even where those workers were able, through proper collective bargaining, to secure agreements which seemed to raise their wages and improve working conditions.[36]

As a result of the 1971 oversight hearings, Congress amended the SCA in 1972.[37] Following the 1972 amendments, the focus of

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1. The DOL was not issuing wage determinations for all service contracts covered by the SCA. The subcommittee found that in Fiscal Year (FY) 1971, the DOL had issued wage determinations for only 35% of covered contracts;

2. Because of the DOL's failure to issue wage determinations, the gap between Wage Board rates (which applied to government blue-collar service employees) and Service Contract rates was growing;

3. The DOL was failing to use the "blacklisting" (i.e., debarment) provisions of the SCA;

4. The DOL's refusal to recognize prospective wage increases in collective bargaining agreements was resulting in a virtual wage freeze for service employees. According to the subcommittee, incumbent contractors who were bound to pay their employees wage increases as a result of collective bargaining consistently were underbid by new contractors when the contract was recompeted. This meant that the employees might never receive a wage increase; and

5. As an offshoot of the above finding, the subcommittee found that incumbent contractors were being "turned out" every year with the new contractors refusing to recognize collective bargaining agreements. The current employees were forced to take pay cuts to keep their jobs. According to the Subcommittee, "[t]he collective bargaining process was becoming a mockery."

[36] *1986 Hearings, supra* note 31, at 13.

[37] Act of Oct. 9, 1972, Pub. L. No. 92-473, §§ 1, 2, 86 Stat. 789. These amendments contained six major provisions:

1. Successor contractors may not reduce the wages or fringe benefits of existing employees;

2. The Secretary of Labor must give "due consideration" to wages and fringe benefits received by Federal Wage Board employees performing similar tasks when making wage determinations;

3. The Secretary of Labor could relieve violators of the SCA from the debarment provisions only in unusual circumstances;

controversy over the SCA turned to the scope of the definition of the term "service employee."[38] In 1974, the Federal District Court for Delaware held that the SCA applied only to employees whose counterparts in federal service would be classified as "wage board" employees.[39] The court distinguished these employees (as "blue-collar" employees) from federal "general schedule" employees (as "white-collar" employees) and found that the SCA applied only to the former.[40] Based on this distinction, the court held that the keypunch operators working on the contract at issue were equivalent to "white-collar" employees and, therefore, were not covered by the SCA.[41] In 1976, the Federal District Court for the Middle District of Florida similarly held that Congress had intended the SCA to apply only to "blue-collar" workers performing work similar to federal "wage-board" employees.42

Primarily as a result of these two decisions, Congress enacted the final amendments to the SCA in 1976.43 These amendments made it clear that all service employees were covered by the Act. Only those employees who fall within the Fair Labor Standards Act's[44] exemption for persons "employed in a bonafide executive, administrative, or professional capacity" are excluded from coverage.[45]

111. Regulatory Provisions

Congress failed to define many key terms that it used in both Acts. Additionally, neither Act contained guidance concerning Congress's intent as to implementation. Instead, these matters were

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4. Prospective increases in wages and fringe benefits contained in collective bargaining agreements were required to be reflected in wage and fringe benefit determinations;

5. The Secretary of Labor could permit service contracts to be awarded for a period of up to five years; and

6. All service contracts involving five or more employees were to be covered by wage and fringe benefit determinations by the end of N 1977.

[38]The SCA only applies to contracts "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351 (1988).

[39]Descomp v. Sampson, 377 F. Supp. 254 (D. Del. 1974).

[40]*Id.* at 263. The court relied heavily on the testimony of the Solicitor of Labor before Congress regarding the intent of the SCA. ***See supra*** note 32 and accompanying text for the relevant portion of that testimony.

[41]*Id.*

[42]Federal Elec. Corp. v. Dunlop, 419 F. Supp. 221 (M.D. Fla. 1976).

[43]Act of Oct. 13, 1976, Pub. L. No. 94-489, §§ 1,2, 90 Stat. 2358 (codified at 41 U.S.C. § 357(b) (1988)).

[44]*See* 29 U.S.C. § 213(a)(1) (1988).

[45]These terms are defined at 29 C.F.R. § 541 (1993).

left to the broad discretion of the Secretary of Labor. The Secretary has issued implementing regulations pertaining to each Act which, as of this writing, cumulatively take up over 140 pages in the Code of Federal Regulations. These regulations apply to DOL personnel, executive agency personnel responsible for awarding and administering the contracts covered by the Acts, and to the awardees of these contracts. To guide executive agency personnel in implementing the Acts, another thirty pages of regulations exist in the Federal Acquisition Regulation *(FAR)*.[46] The regulatory system which has grown up around these Acts is extremely complex and burdensome. This section will describe selected sections of these regulations to provide some insight on the excessive requirements that the Acts place on the DOL, executive agencies, and contractors.

A. The Davis-Bacon Act

1. Definitions—The DBA fails to define the key terms necessary to its implementation. Therefore, implementing regulations define who the Act covers,[47] the work that the Act covers,[48] and the wages a contractor must pay to employees working on a DBA-covered contract.[49]

2. Wage Determinations—The DBA requires that contractors on government construction contracts pay their employees not less than the prevailing wage as determined by the DOL. Contractors are informed of these prevailing wages through the incorporation of wage determinations into solicitations and contracts.

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[46]GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Apr. 1, 1984) hereinafter FAR].

[47]*Id.* 22.401. The DBA applies only to laborers or mechanics: "Those workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade) as distinguished from mental or managerial. . . ." *Id.*

[48]29 C.F.R. § 3.2(b) (1993); FAR, supra note 46, 22.401. The DBA applies to construction, prosecution, completion, or repair which includes altering, remodeling, painting, and decorating. The manufacturing of "materials, articles, supplies, or equipment" is also included if done on the site of the building or work by "persons employed at the site by the contractor or subcontractor." 29 C.F.R.§ 3.2(b) (1993). To be covered by the DBA, laborers or mechanics must perform construction work on a public building or public work: a "building or work, the construction, prosecution, completion, or repair of which . . . is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency."Id.

[49]29 C.F.R. § 1.2(a)(1) (1993). Contractors must pay laborers or mechanics working on a DBA-covered contract at least the prevailing *wage*; "the wage paid to the majority (more than 50 percent) of the laborers and mechanics in the classification on similar projects in the area during the period in question." If no "prevailing" wage exists, then the DOL uses the weighted average of the wages paid to all workers in a classification. *Id.*

a. Types and Availability of Wage Determinations— Two types of DBA wage determinations exist—general and project. General wage determinations cover a specified geographic area and apply to all DBA-covered projects in that area.[50] Project wage determinations are used only when no general wage determination is available and are issued by the DOL at the specific request of the contracting agency.[51]

b. Requesting Wage Determinations— *If* a general wage determination applicable to the project is available, the contracting agency simply incorporates that wage determination into its solicitation and contract without notifying the DOL.[52] If a general wage determination is unavailable, the contracting agency uses a Standard Form (SF) 308 to request a project wage determination from the DOL.[53] Because the DOL takes at least thirty days to process a request for a project wage determination,[54] the contracting agency should submit its request at least forty-five days before it plans to issue a solicitation.55

c. Sources of Information for Wage Determinations— Where does the DOL obtain the prevailing wage information it incorporates into wage determinations? The DOL's regulations state that it "will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties."[56]

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[50]FAR, *supra* note 46, 22.404-1. General wage determinations have no expiration date and remain effective until modified, superseded, or canceled by a notice in the *Federal Register*. General wage determinations should be used by the contracting agency whenever possible. *Id*. 22.404-1(a)(1). Contracting agencies, and other interested persons, can find general wage determinations in a Government Printing Office document entitled *General Wage Determinations Issued Under the Davis-Bacon and Related Acts*. This document is published weekly. Once a general wage determination is incorporated into a contract, it is normally effective for the duration of that contract. *Id*.

[51]*Id*. 22.404-1(b). A project wage determination is effective for 180 calendar days from the date of the determination. Once it is incorporated into a contract, a project wage determination is normally effective for the duration of that contract.

[52]*Id*. 22.404-3.

[53]*Id*. 22.404-3(b). This form must include the following information: the location of the proposed project; the name of the project and a sufficiently detailed description of the work to allow a determination of the type of construction involved; any available pertinent wage payment information; the estimated cost of the project; and all of the classifications of laborers and mechanics likely to be employed.

[54]29 C.F.R. § 1.5(c) (1993); FAR, *supra* note 46, 22.404-3(c).

[55]FAR, *supra* note 46, 22.404-3(c).

[56]29 C.F.R. § 1.3(a) (1993). The DOL may not use data from federal projects subject to the DBA to determine prevailing rates in the area for building and residential construction. *Id*. § 1.3(d). However, the DOL may use this data if it determines that it cannot determine the prevailing rate without using data from federal projects. *Id*. The DOL uses data from federal projects for heavy and highway construction wage determinations. *Id*.

d. Contesting Wage Determinations—Any interested person[57] who feels that a wage determination is in error may request reconsideration of the determination by the DOL.[58] If not satisfied with the results of this reconsideration, an appeal may be filed with the Wage Appeals Board.[59] The Wage Appeals Board is an independent arm of the DOL and has the authority to make final decisions regarding wage determinations.[60] These procedures add to the already expansive bureaucracy surrounding the DBA and result in the expenditure of additional funds on the administration of the Act.

3. Recordkeeping Requirements—Section Two of the Copeland Anti-Kickback Act[61] requires that contractors working on DBA-covered contracts submit weekly payroll reports.[62] The contracting agency must keep the payroll records and statements for three years after completion of the contract and must make them available to the DOL on request.[63] Estimates of the cost to contractors of

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[57]Department of Labor regulations define an "interested person" to include contractors, laborers and, mechanics and federal, state, or local agencies. *Id.* § 7.2(b).

[58]*Id.* § 1.8.

[59]*Id.* § 1.9.

[60]The Wage Appeals Board also has the authority to decide cases involving debarment under the DBA, controversies concerning the payment of prevailing wages or classification of employees, and liquidated damages assessed under the Contract Work Hours and Safety Standards Act 40 U.S.C. § 328 (1988). ***See id.*** § 7.1(b) (1993).

[61]Act of June 13, 1934, Pub. L. No. 73-324, 48 Stat. 948 (1949) (codified as amended at 40 U.S.C. § 276 (1988)).

[62]The Copeland Anti-Kickback Act was enacted to aid in the enforcement of the DBA. THIEBLOT, *supra* note **15,** at 32-33. To the extent that these records are reviewed or used at all, is to enforce the DBA. ***See*** 29 C.F.R. § 3.1 (1993). Every contractor and subcontractor working on a DBA-covered contract must submit a copy of weekly payrolls and weekly payroll statements of compliance (with the requirements of the DBA) to the contracting agency. *Id.* § 3.3(b) (1993); FAR, *supra* note 46, 22.406-6(a). The contractor must submit this information within seven calendar days after the regular payment date of the payroll week covered. *Id.* On receipt of the payroll records and statements, the contracting agency is to examine them "to ensure compliance with the contract and any statutory or regulatory requirement." FAR, *supra* note 46, 22.406-6(c)(1). The contracting agency is to pay particular attention to:

1. "The correctness of classifications and rates;"

2. "Fringe benefits payments;"

3. "Hours worked;"

4. "Deductions;" and

5. "Disproportionate employment ratios of laborers, apprentices, or trainees, to journeymen."

Id.

[63]FAR, *supra* note 46, 22.406-6(d). The regulations also require a contractor to maintain its weekly payroll records for a period of three years after the completion of the contract. 29 C.F.R. § 3.4(b) (1993). These payroll records must "set out accurately and completely the name and address of each laborer and mechanic, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid." *Id.* The contractor must make the records available to representatives of the contracting agency or the DOL on request. *Id.*

these recordkeeping requirements range from **94** million to **235** million dollars.[64] These costs are passed on to the government, increasing the cost burden associated with the DBA.

4. Enforcing the DBA—Contracting agencies are primarily responsible for **DBA** enforcement.[65] As part of this enforcement program, contracting agencies must conduct compliance checks "as may be necessary to ensure compliance with the labor standards requirements of the contract."[66] The cost of compliance with these requirements is a major contributor to the cost contracting agencies incur in administering the DBA.[67]

5. Penalties *for* Noncompliance—The DOL and the contracting agencies have a wide range of options available for dealing with a contractor that is not complying with DBA requirements. First, if, as a result of a compliance check or investigation, the contracting agency believes a violation exists, it must withhold from payments due the contractor an amount equal to the estimated wage underpayment.[68] If the contractor fails to comply with the **DBA,** the contracting agency must suspend any payment, advance, or guarantee

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[64] *See infra* text accompanying notes 195-97, for further discussion concerning these costs.

[65] 29 C.F.R. § 5.6(a)(3) (1993); FAR, *supra* note 46, 22.406- 1(a). These agencies are to maintain an enforcement program that is to include:

> **1.** "Ensuring that contractors and subcontractors are informed, before commencement of work, of their obligations under the labor standards clauses of the contract;"
>
> 2. "Adequate payroll reviews, on-site inspections, and employee interviews to determine compliance by the contractor and subcontractors, and prompt initiation of corrective action when required;"
>
> 3. "Prompt investigation and disposition of complaints;" and
>
> 4. "Prompt submission of all [required] reports . . . ."

FAR, *supra* note 46, 22.406-1(a).

[66] FAR, *supra* note 46, 22.406-7(a). "Regular compliance checks" are to include the following: employee interviews, on-site inspections, payroll reviews, and comparison of the information obtained with other available data such as inspector's reports and construction logs to ensure consistency. *Id.* 22.406-7(b). If a compliance check indicates that violations may have occurred "that are substantial in amount, willful, or not corrected", the contracting agency is required to conduct a labor standards investigation. *Id.* 22.406-8. This investigation is to be made "by personnel familiar with labor laws and their application to contracts." *Id. The Defense Federal Acquisition Regulation Supplement* contains an additional three pages of regulatory guidance and procedures for the conduct of these investigations. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 222.406-8 (1 Apr. 1984) [hereinafter DFARS]. If the contracting agency concludes that the contractor has underpaid its employees, it must request that the contractor make restitution. *Id.*

[67] *See infra* text accompanying notes 198-206 for further discussion concerning these costs.

[68] FAR, *supra* note 46, 22.406-9(a). *But see* Bailey v. Department of Labor, 810 F. Supp. 261 (D. Alaska 1993) (such a withholding, without first providing the contractor a hearing, violated the contractor's due process rights). What effect, if any, this decision will have is uncertain.

of funds until it withholds sufficient funds to compensate employees for the underpayments.[69] Additionally, a contract may be terminated for default for violations of the DBA.[70] Finally, if the Secretary of Labor determines that the violations were aggravated or willful, he or she may debar the contractor for a period of up to three years.[71]

Contracting agencies implement the DBA through the inclusion of labor standards provisions in a covered contract. The FAR lists all of the provisions that agencies must include in contracts subject to the DBA.[72] This section has provided a brief overview of the DBA's application and has provided a glimpse into the Act's complexity and of the burdens that it adds to the award and performance of construction contracts.

B. The Service Contract Act

1. Definitions—As with the DBA, when Congress enacted the SCA, it failed to define many of the key terms necessary to implement the Act. Accordingly, one must look to implementing regulations to determine the type of employee that the SCA covers[73] and the type of contracts covered by the Act.[74]

2. Contracts Exempted from Coverage of the SCA

a. Statutory Exemptions—The SCA specifically

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[69] 29 C.F.R. § 5.9 (1993); FAR, *supra* note 46, 22.406-9(b).

[70] *See* FAR, *supra* note 46, 22.406-11.

[71] 29 C.F.R. § 5.12 (1993). This section contains detailed procedures for implementation of the debarment process.

[72] FAR, *supra* note 46, 22.407.

[73] The SCA covers *service employees,* that is, "any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity . . . ." *Id.* 22.1001; *see also* 29 C.F.R. § 4.113(b) (1993).

[74] FAR, *supra* note 46, 22.1001. The Act covers *seruice contracts;* "any Government contract, the *principal purpose* of which is to furnish services in the United States through the use of service employees . . . or any subcontract at any tier thereunder. The DOL regulations provide examples of *55* types of contracts which DOL considers to be "service contracts." 29 C.F.R. § 4.130 (1993). The DOL regulations state that "[i]f the principal purpose [of a contract] is to provide something other than services . . . the Act does not apply." *Id.* § 4.111. The regulations go on to state:

> [N]o hard and fast rule can be laid down as to the precise meaning of the term *principal purpose.* This remedial Act is intended to be applied to a wide variety of contracts, and the Act does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services. . . . Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case.

Id.

exempts seven types of contracts and work from its coverage.[75] Additionally, the SCA[76] gives the Secretary of Labor the authority to grant administrative exemptions from its coverage.[77]

b. Professional Employees—In addition to the statutory and administrative exemptions discussed above, the SCA does not apply to "any person employed in a bona fide executive, administrative, or professional capacity . . ."[78] Therefore, the services performed on a government contract by these employees are not cov-

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[75]41 U.S.C. § 356 (1988). These exemptions are as follows:

1. Any contract covered by the DBA.

2. Any work covered by the Walsh-Healey Public Contracts Act.

3. Any contract for the carriage of freight and personnel for which published tariff rates are in effect.

4. Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.

5. Any contract for public utility services.

6. Any employment contract calling for direct services to a federal agency by an individual.

7. Any contract with the United States Postal Service the principal purpose of which is the operation of postal contract stations.

[76]*Id.* § 353(b).

[77]The statute authorizes the Secretary to:

> [P]rovide such reasonable limitations and [to] make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions [of the Actl . . . but only in special circumstances where he determines that such limitation, variance, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of [the Actl to protect prevailing labor standards.

Id. § 353(b). The Secretary has used this authority to exempt several types of contracts from the requirements of the SCA. 29 C.F.R. $ 4.123 (1993); FAR, *supra* note 46, 22.1003-4. The most important of these exempts "[clontracts principally for the maintenance, calibration and/or repair of . . . [a]utomated data processing equipment and office information/word processing systems." 29 C.F.R. § 4.123(e)(1)(i) (1993); FAR, *supra* note 46, 22.1003-4(b)(4)(i). However, this exemption may be used only if four specific criteria are met. ***See*** 29 C.F.R. § 4.123(e)(1)(ii) (1993); FAR, *supra* note 46, 22.1003-4(b)(4)(ii). The four criteria are:

1. The items of equipment are commercial items sold in "substantial quantities" to the general public;

2. The services are furnished at prices which are, or are based on, established catalog or market prices;

3. The contractor pays the same wages and fringe benefits on the government contract as it does on commercial contracts for the same services; and

4. The contractor certifies that it complies with the above criteria.

[78]41 U.S.C. § 356 (1988).

ered by the SCA. However, the DOL definition of this exemption is very narrow.[79]

3. General SCA Requirements—The SCA contains two general requirements that apply to all service contracts performed using service employees, regardless of the dollar amount of the contract. The first is that a service contract may not run for more than five years.[80] The second general requirement is that no contractor or subcontractor may pay its employees less than the minimum wage specified in § 6(a)(1) of the Fair Labor Standards Act.[81]

4. Successor Contractors—Section 4(c) of the SCA[82] applies to any contractor and subcontractor awarded a contract "which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished in the same locality."[83] Under these circumstances, the successor contractor or subcontractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed on by a predecessor contractor.[84]

5. SCA Wage Determinations—As with the DBA, agencies must incorporate the minimum wages and fringe benefits, as determined

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[79]*See* 29 C.F.R. pt. 541. The DOL regulations provide that merely because an employee is highly paid is not determinative of whether he or she is excluded from the Act's coverage and states:

> employees [such] as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations . . . are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

Id. § 4.156. The DOL's interpretation of this exemption could lead to situations where highly paid professionals such as engineers and scientists would be covered by the Act. These are not the kinds of workers that Congress intended to protect when it enacted the SCA. *See supra* text accompanying notes 29-32 for a discussion of the congressional intent behind the SCA.

[80]41 U.S.C. § 353(d) (1988); FAR, *supra* note 46, 22.1002-1.

[81]29 U.S.C. § 6(a)(1) (1988). ***See*** 41 U.S.C. § 351(b)(1) (1988); FAR, *supra* note 46, 22.1002-4.

[82]Act of Oct. 22, 1965, Pub. L. No. 89-286, § 4, 86 Stat. 789, *amended by* Act of Oct. 9, 1972, Pub. L. No. 92-473, § 3, 86 Stat. 789 (codified as amended at 41 U.S.C. § 353(c) (1988)).

[83]29 C.F.R. § 4.1b(a) (1993).

[84]FAR, *supra* note 46, 22.1008-3(b). These requirements apply under the following conditions:

> 1. The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed.

by the DOL, into SCA-covered contracts.[85] The DOL will issue these wage determinations "for all contracts entered into under which more than 5 service employees are to be employed."[86] There are two types of SCA wage determinations: "prevailing in the locality"[87]

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2. The services will be performed in the same locality.

3. The incumbent prime contractor or subcontractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

Section 4(c) does not apply if the incumbent contractor enters into a collective bargaining agreement (CBA) for the first time which does not become effective until after the expiration of its current contract. *Id.* 22.1008-3(c)(1). Otherwise, the terms of a new or revised CBA will establish the minimums that a successor contractor can pay. The terms of the new or revised CBA will control unless the contracting agency does not receive notice of the terms of the agreement in time to incorporate them into the new contract. The DOL's regulations (29 C.F.R. § 4.1(b) (1993) and FAR 22.1008-3(c)) provide detailed guidance on these time limits. However, these time limitations apply only if the contracting agency has given both the incumbent contractor and the employee's collective bargaining agent written notification at least 30 days in advance of all applicable acquisition dates. *See* 29 C.F.R. § 4.1(b)(3) (1993); FAR, *supra* note 46, 22.1008- 3(c)(2)(ii). *Federal Acquisition Regulation* 22.1010 provides detailed guidance for the contracting agencies on complying with these requirements.

The terms of a predecessor contractor's CBA will not apply if the Secretary of Labor determines, after a hearing, that:

1. The terms of the CBA are "substantially at variance" with those which prevail in the area (29 C.F.R. § 4.1b(a) (1993)); or

2. The terms of the CBA were not reached "as a result of arm's-length negotiations" (29 C.F.R. § 4.11(a) (1993)).

The DOL's regulations provide detailed guidance on the grounds for, and conduct of, such a hearing. 29 C.F.R. §§ 4.10-4.11, pts. 6, 8. The *FAR* states that contracting agencies may request a hearing if they believe that either of these two conditions exists. FAR, *supra* note 46, 22.1013(a).

Under the DOL's regulations, it makes no difference whether the successor contractor has its own CBA with its employees. 29 C.F.R. § 4.163(d) (1993). The regulations state:

> The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract nor does it negate the application of a prevailing wage determination issued pursuant to section 2(a) where there was no applicable predecessor collective bargaining agreement.

Thus, a successor contractor's CBA is valid, at least as far as wages and fringe benefits are concerned, only if it provides for payments in excess of those provided for in the predecessor contractor's CBA. *Id.*

[85] 29 C.F.R. §4.3(a) (1993).

[86] *Id.*

[87] These wage determinations "are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made." *Id.* § 4.51(a). The DOL most frequently uses information "derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel." The DOL also will use the wages and fringe benefits found in collective bargaining agreements "where they have been determined to prevail in a locality for specified occupational class(es) of employees." The DOL determines the prevailing rate for the locality by using the "single rate which is paid to a

determinations and "collective bargaining agreement (successorship?"determinations.[88]

6. Requesting Wage Determinations — For every service contract expected to exceed $2500, contracting agencies must file a "notice of intention to make a service contract" with the DOL.[89] This notice is submitted on an SF 98, Notice of Intention to Make a Service Contract, with its attachment, SF 98a (hereinafter referred to together as the "notice").[90]

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majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality."Id. § 4.51(b). If there is no single rate paid to a majority, the DOL uses the statistical mean (average) or median rate. Id. This section provides details on when the mean, vice the median, rate is to be used.

In addition to these sources of information, the DOL must give "due consideration" to the rates that would be paid by the contracting agency to the service employees if they were employed under the Civil Service system. 41 U.S.C. § 351(a)(5) (1988);29 C.F.R. 4.51(d) (1993). The statute refers to the rates which would be paid "to the various classes of service employees if § 5341 [covering "blue-collar" employees] or § 5332 [covering "white-collar" employees] of Title 5 were applicable to them." Unfortunately, the term due consideration is not defined in the statute. The DOL regulations state:

> The term due consideration implies the exercise of discretion on the basis of the facts and circumstances surrounding each determination, recognizing the legislative objective of narrowing the gap between the wage rates and fringe benefits prevailing for service employees and those established for the Federal employees. Each wage determination is based on a survey or other information on the wage rates and fringe benefits being paid in a particular locality and also takes into account those wage rates and fringe benefits which would be paid under Federal pay systems.

29 C.F.R. § 4.51(d) (1993).

[88]29 C.F.R. § 4.50 (1993).Section 4(c) of the SCA specifically dictates the wages to be paid in cases when there is a predecessor contractor that has a CBA with its employees. See supra notes 82-84 and accompanying text for a discussion of the requirements of § 4(c) of the SCA. In such a case, therefore, the DOL's wage determination simply sets forth the wages and fringe benefits contained in the CBA. *Id.* § 4.52. Accrued wages and fringe benefits, and any prospective increases, also are included in the wage determination. Id.

[89]29 C.F.R. § 4.4(a)(1) (1993);FAR, supra note 46, 22.1007.

[90]*Id.* The SF 98a must include the following information:

1."All classes of service employees to be utilized" on the contract. FAR, supra note 46, 22.1008-2(a)(1). If section 4(c) of the SCA applies, the exact title of each classification in the collective bargaining agreement (CBA) should be used. Id. Additionally, the contracting agency must obtain a copy of the CBA and attach it to the SF 98. Id. 22.1008-3(d); 29 C.F.R. § 4.4(c) (1993). If section 4(c) does not apply, the classification titles from the DOL's *Service* Contract Act Directory *of* Occupations should be used. FAR, supra note 46, 22.1008-2(a)(1).

2. "The estimated number of service employees in each class."Id.

3. "The wage rate that would be paid each class if employed by the agency" as Civil Service employees. The *FAR* sets out specific procedures for computing these "equivalent rates."*Id.*

One of the items of information that contracting agencies must include on the notice is the place where the services are to be performed. The DOL requires this information to determine the rates prevailing in the locality.[91]

7. Receipt of Wage Determinations — The *FAR* contains several provisions concerning late receipt of wage determinations.92 A contracting agency properly may not award a covered contract that does not include a wage determination.93 Therefore, if the contracting agency cannot use a previously issued wage determination (or CBA) on a procurement, it must delay contract award until the DOL issues a wage determination. The procedures for late receipt of wage determinations will apply only if the contracting agency fails to receive a revised wage determination within the prescribed time.

8. Conformance Procedures — In some cases, contract performance will require classes of service employees not included in existing wage determinations. Before a contractor can use the unlisted classes of employees on the contract, it must initiate "conformance procedures."[94] The contractor must provide "an appropriate level of skill comparison" between the unlisted classifications and the classifications contained in the wage determination.95 The contractor provides this information to the contracting agency using an SF 1444, Request for Authorization of Additional Classification

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If the procurement is for a "known or recurring requirement," the contracting agency must submit the notice not less than 60, nor more than 120, days before the earliest of: (1) issuance of any invitation for bids; (2) issuance of any request for proposals; (3) commencement of negotiations; (4) issuance of a modification for [the] exercise of [an] option, contract extension, or change in scope; (5) annual anniversary date of a contract for more than one year subject to annual appropriations; (6) each biennial anniversary date of a contract for more than two years not subject to annual appropriations . . . . *Id.* 22.1008-7. The *FAR* provides for shorter time frames for unplanned or emergency requirements. *Id.*

[91] When the services will be performed at a government facility, or some other known location, this is not a problem. However, in some cases, such as for services to be performed at the contractor's location, the place of performance will not be known until the contract is awarded. In this situation, the contracting agency must first determine all possible places of performance using information such as prior procurements, mailing lists, and responses to presolicitation notices. FAR, *supra* note 46, 22.1009-2. Once it has done this, the agency must request wage determinations for each of the possible places of performance identified. *Id.* 22.1009-3. If the contracting agency learns of additional places of performance, it must submit requests for additional wage determinations to cover those places. *Id.* The FAR also contains detailed procedures for the contracting agency to follow if it cannot identify all possible places of performance. *See id.* 22.1009-4.

[92] *See generally id.* subpt. 22.1012.

[93] 41 U.S.C. § 358 (1988); 29 C.F.R. § 4.4(f) (1993).

[94] FAR, *supra* note 46, 22.1019.

[95] *Id.*

and Rate.[96] The contracting agency must review the form and forward it to the DOL with recommendations,[97] and the DOL must approve, disapprove, or modify the request within thirty days.[98]

9. Option Exercises—The DOL considers the exercise of an option to be a new contract for SCA purposes.[99] Therefore, each option exercise requires the incorporation of a new or revised wage determination into the contract.[100] This means that contracting agencies must go through the entire wage determination process, as described above, each time they exercise options.

10. Recordkeeping Requirements—Each contract in excess of $2500 subject to the SCA must contain a clause which, among other things, requires the contractor to keep extensive records.[101]

11. SCA Violations—The DOL regulations provide that "[a]ny employer, employee, labor or trade organization, contracting agency, or other interested person or organization" may report a violation, or apparent violation, of the SCA to the DOL.[102] Unlike cases involving the DBA, the primary responsibility for investigating these complaints rests with the DOL, not the contracting agency.[103] The contracting agencies must cooperate with the DOL during its conduct of these investigations.[104]

This section has provided an overview of the regulations pro-

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[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] 29 C.F.R. § 4.143 (1993).

[100] *Id.*

[101] *Id.* § **4.6.** The clause is set out in this section and at *FAR* 52.222-41. These records must include the following:

1. The name, address, and social security number of each employee;

2. The correct work classification and rate of pay for each employee; and

3. The number of daily and weekly hours worked by each employee.

See 29 C.F.R. § 4.6 (1993); FAR, *supra* note 46, 52.222-41. The contractor must keep these records for three years from the completion of the work. 29 C.F.R. §§ **4.6,** 4.185 (1993). The records must be kept on a weekly basis. Id. **A** contractor's failure to maintain such records could subject it to withholding of funds due it under the contract. Id. C.F.R. § 4.6.

[102] 29 C.F.R. § 4.191 (1993).

[103] *Id.*

[104] FAR, *supra* note 46, 22.1024. If the DOL determines that a contractor has underpaid its employees, it can request the contracting agency to withhold funds due the contractor in an amount sufficient to reimburse the employees for the underpayment. 29 C.F.R. § 4.187 (1993). The contracting agency must comply with a DOL request to withhold funds. *Id.* When the DOL requests withholding, the contracting agency must transfer the funds, to the extent available, to the DOL for payment to the employees. Id. The contracting agency also may withhold and transfer funds to the DOL on its own initiative. FAR, *supra* note 46, 22.1022.

mulgated to implement the **DBA** and **SCA** and given the reader some idea of the tremendous complexity involved in the oversight and administration of two seemingly simple statutes. This complexity is a major cause of the frustration experienced by government and contractor personnel charged with implementing these Acts.[105] The problems and costs associated with the administration of the **DBA** and **SCA** will be discussed in Section V.

IV. Current Proposals for Repeal or Reform

Over the years, numerous bills have been introduced in Congress seeking to repeal or significantly restrict the coverage of both the **DBA** and the SCA.[106] The 104th Congress has seen its

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Contractor violations of the SCA may result in termination of the contract for default. Id. **22.1023.** Violation of the SCA also will lead to a three-year debarment of the contractor. The Secretary of Labor must debar a contractor found to have violated the SCA unless he recommends otherwise due to "unusual circumstances." **29** C.F.R. **§ 4.188 (1993).**

[105]To illustrate, as part of the research for this article, the author mailed surveys to **245** Department of the Army, Navy, Air Force, and Defense Logistics Agency activities that deal with contracts covered by the DBA and **SCA.** One of the survey questions asked whether these organizations ever experienced any delays in obtaining timely SCA wage determinations from the DOL. Of the **121** who responded to this question, **64** (or **53%)** answered "often." Respondents included the following comments on this subject:

> "Wage determinations issued against an individual's SF **98** are consistently late."
>
> "My experience with [thel DOL is [that] they are very slow in responding to requests for wage determinations and when enforcement problems arise."

These comments evidence part of the frustration that the SCA causes government personnel—it delays their procurements. This is not due to any particular failing on the part of the DOL but reflects the difficulty involved in trying to make SCA wage determinations. However, some of the comments received reflected a great deal of frustration with the DOL:

> "[Wage rate determinations are] often incomplete or incorrect. Absolute frustration in attempting to contact a live person (answering machine messages left with no return calls). It seems [that] if [thel DOL is delinquent or late in responding to a labor issue, they take no blame often causing the government installation and/or contractor money. My personal thoughts as a contracting officer is [sic] that if DOL does not have the resources to adequately administer the regulatory requirements of the SCA or DBA, then they (SCA and DBA) are: **1.** not needed or **2.** regulatory requirements need major revisions."
>
> "[The] DOL is absolutely *the* most incompetent government agency there is! Their workers have a terrible attitude and do not recognize the concept of 'customers'. Please consider a recommendation that [the] DOL's role be abolished—either turn it over to [thel DOD or privatize the DB/SCA role [that thel DOL plays. P.S., we spend/waste more time with [thel DOL than [in] administering the statutes."

[106]*See, e.g.*, supra note **14.**

share of proposals seeking to somehow modify either the DBA, the SCA, or both. This section will identify and discuss all of the bills that would amend or repeal either Act. Also included is a discussion of two reports that contain recommendations for changes to both Acts.

A. *Proposals for Repeal*

Currently, before Congress there are two bills which call for the repeal of the DBA[107] and one which calls for the repeal of the SCA.[108] As of the date of this writing, two of these bills had cleared a House subcommittee and were headed for action by the full committee.[109]

B. Bills Amending the ***DBA***

Congress currently is considering one bill that would make major changes to the DBA.[110] This bill, introduced by House Democrats, depicts how and where the political battle lines will be drawn between Republicans, who favor repeal of the DBA,[111] and Democrats, who support retention of the DBA in some form.[112] A brief analysis of the provisions of this bill follows.

The bill would raise the threshold for DBA coverage to $100,000.[113] Some sources have estimated that this increase would eliminate 52.5% of DOD contract actions from DBA coverage but only seven percent of the dollars.[114] This would result in some savings on the administrative costs associated with the DBA.[115] However, because this change would reduce the amount of contract dollars covered by the DBA only slightly, the direct costs associated with the DBA, which are the Act's major cost impact[116] would be reduced only slightly.

The DBA no longer would preempt the coverage of state or

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[107]The bills are: S. 141, 104th Cong., 1st Sess. (1995); H.R. 500, 104th Cong., 1st Sess. (1995).

[108]H.R. 246, 104th Cong., 1st Sess. (1995).

[109]*See* Fed. Cont. Rep. (BNA), No. 63, at 324 (Mar. 6, 1995).

[110]H.R. 967, 104th Cong., 1st Sess. (1995) [hereinafter H.R. 9671.

[111]*See* Gingrich Hints at Davis-Bacon Repeal, Fed. Cont. Rep. (BNA), No. 63, at 230 (Feb. 13, 1995); Davis-Bacon *Battlelines* are *Drawn*, 37 Gov't Cont. (Fed. Pubs.), No. 7, ¶ 98 (Feb. 22, 1995).

[112]*Id.*

[113]H.R. 967, supra note 110, § 2.

[114]DEPARTMENT OF DEFENSE, ACQUISITION LAW ADVISORY PANEL, STREAMLINING DEFENSE ACQUISITION LAWS 4-26 (1993) [hereinafter DOD ACQUISITION PANEL].

[115]*See* infra text accompanying notes 195-206 for a discussion of these costs.

[116]*See* infra text accompanying notes 176-94 for a discussion of the direct costs associated with the DBA.

local prevailing wage laws to federal projects.[117] Therefore, if a state or local prevailing wage law requires higher rates than the DBA wage determination, or if the contract is below the $100,000 threshold, state or local law will control.[118]

The bill contains a provision that requires contracting agencies to add the costs of multiple contracts for the same or related work at a project site and to treat the sum as the cost of a single contract.[119] Therefore, if the aggregate costs of the individual contracts are more than $100,000, the DBA will apply to all of the contracts. This change would bring many smaller contracts, not currently covered by the DBA, under the Act's coverage which would further undermine the positive effects of increasing the DBA threshold to $100,000.

The bill also creates a private right of action to enforce this provision. Under the bill, any interested person may bring an action against the Secretary of Labor, the head of the contracting agency, or "the contracting authority" which entered into the contract.[120] The suit may be brought in the district court in which the violation is alleged to have occurred or in the District Court for the District of Columbia.[121]

If the court finds that the government failed to properly aggregate the contracts and, therefore, that the DBA should have applied, it may award the employees the difference between the DBA wage rates and the wage rates actually paid.[122] The court also may award interest on this amount beginning from the date construction began.[123] It also may award attorney's fees and court costs.[124] The bill defines an "interested person" as "any contractor likely to seek or to work under a contract to which [the prevailing wage provisions of the Act] applies, any association representing such a contractor, any laborer or mechanic likely to be employed or to seek employment under such a contract, or any labor organization which represents such a laborer or mechanic."[125]

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[117] H.R. 967, ***supra*** note 110, § 2(b)(2).

[118] In states where the threshold for coverage and the methods for determining the prevailing wage are similar to that in the **DBA,** this change would eliminate the effects of the increase in the **DBA** threshold.

[119] H.R. 967, *supra* note 110, § 2(b)(3).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* § 8. If this bill is enacted, it will be interesting to see how a court determines whether a person is a "laborer or mechanic likely to be employed or to seek employment" under the contract.

The bill provides that helpers may be used only if the practice of using helpers prevails in the area.[126] Such a restriction on the use of helpers adds significantly to the cost of DBA-covered construction.[127]

The bill would require the DOL to consider wages paid on other DBA-covered projects in the area when determining the prevailing wage for all types of construction.[128]

The bill also would require the DOL, in any situation where it has insufficient data to determine the prevailing wage for any area, to use as the prevailing wage the "highest prevailing wage determined . . . to be prevailing in an area in the State which is comparable to the area in which the contract is to be performed."[129] This apparently means that the DOL will have to use the highest prevailing wage it can find in an urban or rural area of the state depending on the nature of the area in which the project is to be located. Such a change in practice would further increase already inflated prevailing rate determinations.[130]

The bill provides for another private right of action which would allow any "interested person" to challenge a determination that the DBA does not apply to a project.[131] Following an administrative review at the DOL, a party may bring suit in any circuit court of appeals for the circuit in which the person is located or in the Court of Appeals for the District of Columbia Circuit.[132]

The bill states that an employer who pays less than the prevailing wage prescribed by the Act is liable for the amount of the underpayment.[133] If the violation is willful, the employer also is liable for liquidated damages in an amount equal to the amount of the underpayment.[134] The bill provides for yet another private right of action allowing an "interested party" (this term is not defined) or a laborer or mechanic to sue the employer to recover such underpay-

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[126] *Id.* § 2(c)(4).

[127] *See infra* text accompanying note 194 for an estimate of these costs.

[128] H.R. 967, *supra* note 110, § 3(b)(1). Current DOL regulations prohibit the use of **DBA** rates in the calculation of the prevailing rates in most circumstances. ***See*** 29 C.F.R. § 1.3(d) (1993).

[129] H.R. 967, *supra* note 110, § 3(b)(2).

[130] *See infra* text accompanying notes 171-73 for an explanation of how the insertion of the prevailing rate as a minimum wage into a labor market inflates wages. The use of the highest available prevailing rate would result in the acceleration of this process.

[131] H.R. 967, *supra* note 110, § 4(b)(2).

[132] *Id.*

[133] *Id.* § 4(d).

[134] *Id.* In effect, the bill provides for a double recovery for willful violations.

ments.[135] The suit may be brought in "any Federal or State court of competent jurisdiction."[136] A successful plaintiff also may recover costs and attorney's fees.[137] The three new rights of action created under this bill would spawn an increase in litigation that would add to the large administrative costs already associated with the DBA.

The bill would expand the coverage of the DBA by expanding the definition of the term "construction." The expanded definition would include:

> [T]he transporting of materials and supplies to or from the building or work by the employees of the construction contractor or its subcontractors, including independent hauling contractors, and the manufacturing or furnishing of materials, articles, supplies or equipment for the project from facilities dedicated exclusively, or nearly so, to the prosecution of the [DBA-covered] building or work . . .[138]

This change would increase the number of persons covered by the DBA and, therefore, would further increase the direct and administrative costs associated with the Act.

10. The bill would change the reporting requirements under the Copeland Anti-Kickback Act from a weekly to a monthly requirement.[139] As noted earlier, any lessening of the Act's reporting requirements result in significant administrative costs.[140]

Finally, the bill directs the Secretary of Labor to study the feasibility of employers using electronic methods to comply with the reporting requirements.[141]

The increase in the DBA's threshold and decrease in its reporting requirements proposed by this bill could result in some cost savings. However, the bill's expansion of the Act's coverage and creation of new private rights of action would more than offset these savings.

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* § 8. Current **DOL** regulations provide that the manufacturing of materials or supplies at a permanent, previously established facility is not covered as part of the site of the work, even if the facility is dedicated exclusively, or nearly so, to the performance of the contract. ***See*** 29 C.F.R. § 5.2(l)(3) (1993). Likewise, transportation of materials or supplies between such a facility and the site of the work is not considered construction and, therefore, is not covered by the **DBA.** ***See id.*** § 5.2(j)(2). It appears from its wording that this section of the bill would require **DBA** coverage in both cases.

[139] *Id.* § 2. ***See*** *supra* text accompanying notes 61-64 for further discussion of these reporting requirements.

[140] *See supra* text accompanying notes 61-64.

[141] H.R. 967, *supra* note 110, § **2.**

The net effect of this bill would be to increase the cost burden imposed by the DBA.

D. Other *Proposals for* Change

In addition to the legislative proposals discussed above, two reports were issued in 1993 which recommended changes to the SCA and DBA.

1. The "Section 800 Committee"—In Section 800 of the Defense Authorization Act for FY 1991,[142] Congress directed the DOD to establish a DOD advisory panel on streamlining and codifying acquisition laws.[143] The DOD Acquisition Law Advisory Panel issued its report to Congress in January 1993.[144] Chapter Four of the Panel's report deals, in part, with the DBA and SCA. The Panel recommended the establishment of a "simplified acquisition threshold" at $100,000.[145] The Panel then recommended increasing the "statutory floors" for several statutes, including the DBA and SCA, to match this new threshold.[146] In other words, if Congress were to adopt the Panel's recommendations, neither the DBA nor the SCA would apply to contracts of less than $100,000. The Panel stated that this change would, in the case of the DBA, "streamline" 52.5% of DOD contract actions above $25,000 while affecting only seven percent of the dollars.[147] For the SCA, this increase in the threshold would "streamline" 57.3% of the contract actions while affecting only 7.8% of the dollars.[148] Although this change in the DBA's threshold would result in some administrative cost savings by reducing the number of contract actions covered by the Act, the DBA's direct cost impact would not be reduced significantly.[149]

The Panel also recommended two additional changes to the DBA. First, the panel recommended that the reporting requirements be changed to require reports only at the beginning, midpoint) and end of the contract period, but no less than quarterly.[150]

Second, the Panel recommended that the DOL change the way

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[142] Pub. L. No. 101-510 (1990).

[143] *Id.*

[144] DOD ACQUISITION PANEL, *supra* note 114.

[145] *Id.* at 4-10. Congress enacted this recommendation in the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4001 (1994) [hereinafter FASA].

[146] *Id.* at 4-12. Congress has not yet adopted this recommendation.

[147] *Id.* at 4-26.

[148] *Id.*

[149] *See supra* text accompanying note 116.

[150] DOD ACQUISITION PANEL, *supra* note 114, at 4-53.

that it issues wage determinations.[151] Rather than the general and project wage determination system that the DOL currently uses, the Panel recommended the use of annual wage determinations which cover all of the labor classifications in a given area for a one-year period.[152] This change would lessen the burden of wage determination preparation on the DOL.[153]

2. The National Performance Review—On March 3, 1993, President Clinton announced the formation of a "National Performance Review" (NPR) to be directed by Vice President Gore. The purpose of the NPR was "to redesign, to reinvent, [and] to reinvigorate the entire national government."[154] On September 7, 1993, the President released the NPR report.[155] Chapter One of the report deals, in part, with the "four federal labor laws implemented through the federal procurement process."[156] Addressing these statutes generally, the report states that:

> [e]ach was passed because of valid and well founded concerns about the welfare of working Americans. But as part of our effort to make the government's procurement process work more efficiently, we must consider whether those laws are still necessary—and whether the burdens they impose on the procurement system are reasonable ones.[157]

Those who conducted the review apparently answered these questions in the affirmative, because the report recommends the repeal of only the Walsh-Healey Public Contracts Act.[158]

With regard to the DBA, the report observes that the $2000 threshold for DBA coverage was set more than sixty years ago and recommends an increase in this threshold to $100,000.[159] As for the SCA, the report finds that the Act's "five-year limit [on the length of service contracts] is inconsistent with the government's interest in entering into long range contracts."[160] The report recommends that

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] 35 Gov't Cont. (Fed. Pub.), ¶ 167 (1993).

[155] NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993).

[156] *Id.* at 35. The report identifies these laws as: The Davis-Bacon Act, the Service Contract Act, the Copeland Anti-Kickback Act, and the Walsh-Healey Public Contracts Act.

[157] *Id.*

[158] *Id.* at 30-31.

[159] *Id.* at 31.

[160] *Id.*

Congress increase the limit to ten years.[161] The report does not recommend an increase in the SCA threshold or any other changes to the SCA.

The report also recommends a relaxation of the reporting requirements imposed by the Copeland Anti-Kickback Act.[162] If the report's recommendation is adopted, the requirement for weekly payroll submissions would be eliminated.[163] Instead, contractors would certify their compliance with the law "with each payment."[164] Contractors would still be required to keep their payroll records for three years to prove compliance if necessary.[165]

There has been a great deal of activity regarding the DBA and SCA over the past several years. As one reads the descriptions of these various proposals, the two schools of thought regarding the Acts become readily apparent. On the one side, there is a call for outright repeal of both Acts; while on the other, there are suggestions to expand the Acts' coverage (at least with regard to the DBA). The next section provides the author's views on the appropriate congressional action.

V. The DBA and SCA Should Be Repealed

It is now time to turn to two questions. First, are the benefits derived from these Acts worth the direct and administrative costs associated with their application? Second, are the Acts still necessary? This section discusses the issues associated with these questions and concludes that the answer to both is "no."

A. *The Prevailing Wage Concept Is Inherently Flawed*

Before discussing the specific shortcomings of each Act, some general comments related to the concept of prevailing wages, applicable to both Acts, are required. As noted previously,[166] neither Act defines the term "prevailing wage." This lack of definition has forced the DOL to try to establish a workable method for determin-

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* Presumably, this means with each payment request submitted to the government, rather than requiring a certification with each payment to an employee

[165] *Id.*

[166] *See, e.g.*, text following notes **13** and **45.**

ing the wages that are prevailing in a locality.[167] There are several problems with the DOL's chosen methods and with the concept of "prevailing" in general.

"Prevailing" is not in itself a statistical parameter. Additionally, the application of statistical parameters, such as the mean (average) or median, produces results that are sometimes contrary to common sense. Two examples used by Dr. Armand J. Thieblot in his study of the Acts illustrate this point.[168] First, consider the following series of digits representing wage rates: **2,** 2, **5,** 8, 8. In this case, there is no majority rate. The mean rate (used for SCA purposes)[169] is **5.** The average rate (used for DBA purposes)[170] also is **5.** However, this is the wage paid to only one of the five workers involved. This result does not appear to comport with the common understanding of the term "prevailing."

Next, consider a different distribution of digits representing wages: **1, 1, 1, 7, 7,** 8, 8, 9, 9. Again in this case, no majority rate occurs. The median rate is **7;** the rate that would be applied for SCA purposes. The weighted average of these rates is 5.67, which is the rate that would be applied for DBA purposes. Intuitively, one would think that the "prevailing" rate in this case would be somewhere over **7.** However, neither statistical parameter applied by the DOL reaches this result.

The application of the prevailing rate concept also is inherently inflationary. Again, an example from Dr. Thieblot illustrates this point.[171] In a labor force of four individuals whose wage rates are represented by the digits **1,** 2, **3,** and **4,** the application of a prevailing wage law would result in a rate of 2.5, the average rate. This rate would become the minimum which employers could pay the workers. Therefore, the wages paid in this locality would now be **2.5,** 2.5, **3,** and **4.** The next time that the prevailing rates are calculated, the new rate would be **3.** The next average would be based on rates of **3, 3, 3,** and **4,** resulting in a prevailing rate of **3.25.** In two iterations, the prevailing rate would have increased from 2.5 to **3.25.** As Dr. Thieblot observes, this example is highly contrived[172] (primarily because it assumes that only rates covered by the prevailing wage law will be included in the calculations). However, it is

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[167] *See supra* text accompanying notes 49 (regarding the DBA) and 87 (regarding the SCA), for a discussion **of** how the DOL has defined "prevailing."

[168] PREVAILING **WAGE** LEGISLATION, *supra* note **23,** at 17-18.

[169] *See supra* text accompanying notes 87-88.

[170] *See supra* text accompanying notes 45-46.

[171] PREVAILING **WAGE** LEGISLATION, *supra* note **23,** at 19.

[172] *Id.*

a simple example which illustrates the concept. This example also illustrates the inflationary effect of using wage rates from DBA-covered projects in the prevailing rate calculation. The General Accounting Office (GAO) discussed this concept in a report on the SCA:

> Such prevailing rates, by their nature, do not recognize the limited skills and experience of newly hired or entry-level workers and assume that all workers in a job classification are entitled to the same wage rate. Moreover, once a "prevailing" rate is established in a wage determination as the minimum which can be paid, it becomes the floor for adjusting the wage differentials for higher skilled and more experienced workers in the same job class and for later revising that rate in future determinations. This can quickly escalate wages paid service workers on Federal contracts and can create or widen a gap between the federally mandated rates on SCA-covered contracts and those being paid private sector workers in the same job classifications in the local labor market.[173]

Because the principles are identical, the same problems apply to the application of the prevailing rate concept under the DBA.

Finally, the DOL's application of the prevailing rate concept causes further problems. The following example, based on an example contained in a Congressional Budget Office (CBO) study of the DBA[174] illustrates the point. Consider three cases involving hypothetical distributions of workers and wage rates:

Case 1		Case 2		Case 3	
Percent of Workers	Hourly Wage	Percent of Workers	Hourly Wage	Percent of Workers	Hourly Wage
75	$8.00	25	$8.00	48	$8.00
25	10.00	25	8.01	27	9.00
		25	8.02	25	10.00
		25	10.00		

For Case 1, there is a clear majority of workers earning $8.00. Therefore, under both the SCA and DBA, the prevailing rate would be $8.00. In Case 2, the same seventy-five percent majority earns

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[173] UNITED STATES GENERAL ACCOUNTING OFFICE, THE CONGRESS SHOULD CONSIDER REPEAL OF THE SERVICE CONTRACT ACT 11 (1983).

[174] THE CONGRESS OF THE UNITED STATES, CONGRESSIONAL BUDGET OFFICE, MODIFYING THE DAVIS-BACON ACT: IMPLICATIONS FOR THE LABOR MARKET ATD THE FEDERAL BUDGET 21 (1983) **[hereinafter** CBO STUDY].

between $8.00 and $8.02. However, because the DOL bases all of its calculation on a to-the-penny rate, the small differences between the three rates mean that there is no majority rate.[175] Therefore, the average rate of $8.51 would become the prevailing rate. This method of calculation results in a minimum rate that is at least $.49 per hour higher than the rate paid to seventy-five percent of the workers in the workforce. The results in Case 3 differ depending on which Act is applied. Even though forty-eight percent of the workers are paid $8.00, this rate would not be the prevailing rate under either Act because it is not paid to a majority (more than fifty percent) of the workers. Under the SCA, the median rate of $9.00 would be considered prevailing. Under the DBA, the average rate of **$8.77** would be used. This example shows that only in cases where there is a single wage rate (to the penny) paid to a clear majority of workers does the prevailing rate, as determined under DOL procedures, come close to the rate one would intuitively consider to be prevailing.

B. *The* Davis-Bacon *Act*

This discussion focuses on four issues associated with the DBA: direct costs of the Act; administrative cost of the Act; the Act's social impact; and the continued need for the Act's protections.

1. Direct Costs—Before attempting to quantify the direct costs associated with application of the DBA, what is meant by "direct cost" must be defined and some of the reasons that the administration of the Act results in such costs must be discussed. The direct cost of the DBA is usually discussed in terms of the amount that the government would pay for labor costs but for the requirements of the Act. In other words, the direct cost is the difference between the prevailing rate determined by the DOL and the rate that the government would have to pay in the open market. For the government to incur extra costs as a result of the DBA, the prevailing rates established by the DOL must be higher than the rates available on the open market.[176] Part of the reason for this phenomenon are the failings of the prevailing wage concept discussed above.[177] There are also several reasons related to DOL wage determination procedures which help explain why this may be the case. First, the DOL collects wage rate data on a project basis rather than on individual

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[175] *See generally* UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIV., CONDUCTING SURVEYS FOR DAVIS-BACON CONSTRUCTION WAGE DETERMINATIONS: RESOURCE BOOK 64-65 (1989) [hereinafter DOL MANUAL].

[176] *See infra* discussion accompanying notes 186-94.

[177] *See supra* text accompanying notes 166-75.

workers.[178] This data overstates the number of workers in the area and can bias the survey results.[179] In a 1979 report on the DBA, the GAO used the following example to illustrate the problem.[180] Assume the county being surveyed has only two contractors, **A** and *B*, which employ fifteen and five carpenters, respectively. Contractor **A** worked on a large project for a full year and reported that it paid a rate of $7.00 per hour to its carpenters. Contractor *B* worked on ten smaller projects during the year and reported that it paid a rate of $10.00 per hour to its carpenters on each project. The DOL would compile this data as follows:

A—15 carpenters at $ 7.00

B—50 carpenters at $10.00

Based on the majority rule, the DOL would establish the prevailing rate at $10.00 per hour. However, this rate was actually paid to only twenty-five percent of the carpenters in the area.

Another contributing problem is that the DOL relies primarily on the voluntary submission of wage data for use in establishing the prevailing rate.[181] This could result in the use of data biased toward the rates paid by a particular group of contractors, such as those with unionized employees. In 1989, the DOL published a 109-page reference/training manual to aid its employees in preparing DBA wage surveys.[182] This guide discusses bias in wage data surveys, stating that nonrespondents are more likely to be open shop (i.e., nonunion) contractors than union contractors for two reasons.[183] First, it is easier for union contractors to collect the wage data because the rates are in the CBA. Second, open shop contractors consider wages proprietary information and are reluctant to report it. On the other hand, union wage rates already are published in the CBA. The manual states that steps should be taken to eliminate this bias but notes, "These steps will not always be successful and will have to be balanced against the need for efficiency."[184] Because union rates generally run higher than open shop rates, any bias toward union rates will increase the DOL's prevailing wage rate.[185]

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[178] UNITED STATES GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED 51 (1979) bereinafter DBA Repeal]. ***See*** *also* DOL MANUAL, *supra* note 175.

[179] *Id.*

[180] *Id.*

[181] *See supra* discussion accompanying note 56.

[182] DOL MANUAL, *supra* note 175.

[183] *Id.* at **30.**

[184] *Id.*

[185] *See generally* THIEBLOT, *supra* note 15, at 57

Numerous studies have attempted to quantify the additional costs that the DBA imposes on the government. The following analysis of several of these studies provide an example of the magnitude of the costs involved.

In his study on the DBA, Dr. Thieblot estimated the Act's impact by using a comparison of contract bids during the period that President Nixon suspended the DBA.[186] Dr. Thieblot compared the original bids on contracts subject to the DBA with the rebids for the same contracts during the time the Act was suspended. Based on this comparison, he estimated that the DBA cost the government $620 million to $1 billion annually (in 1972 dollars).[187]

In 1974, Dr. Thieblot conducted a more detailed study of the Act's impact.[188] This study was based on survey responses from 1402 contractors representing over 180,000 employees in every major construction trade. The respondents reported that the average DBA labor cost was 31.1% of total job costs. The average rate increases (the difference between the DBA rates and the rates the respondents paid on non-DBA work) was thirty-six percent. This results in a total job cost increase of 5.6%. On total federal construction of $47 billion in FY 1992,[189] this is direct impact of $2.6 billion of annual excess costs.

In 1992 testimony before a House Subcommittee, the Director of the CBO noted that estimates of the DBA's cost effect ranged from 0.1% in a study by North Carolina State University to eleven percent in a study by President Carter's Council of Economic Advisors.[190] He then referred to a 1983 study that the CBO had conducted[191] and stated that because little had been written about the impact of the DBA since that time, the CBO continued to use the 1983 study as the basis for its cost estimates.[192] The 1983 study determined that the use of average rate calculations to determine the prevailing wage for DBA purposes increased the costs to the government by 1.5%.[193] The study also estimated that the prohibi-

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[186] *Id.* at 89-94. President Nixon suspended the DBA for **34** days beginning February **23,** 1971, because of rapid inflation in the cost of construction, caused primarily by the rapid escalation of construction wages.

[187] *Id.*

[188] *Id.* at 157.

[189] *Hearings on H.R. **1231,** The Davis-Bacon Reform Bill of 1993, Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor,* 103d Cong., 1st Sess. (1993) (statement of Robert D. Reischauer, Director, CBO) [hereinafter Reischauer Statement].

[190] *Id.*

[191] CBO *STUDY, supra* note 174.

[192] Reischauer Statement, *supra* note 189.

[193] *Id.*

tion on the use of helpers added an additional 1.6% to the costs.[194] The result is a total cost impact of 3.1%. Using the $47 billion figure for federal construction in FY 1992, the annual direct cost impact of the DBA is $1.46 billion.

2. Administrative Costs—The DBA imposes administrative costs on both contractors and the government. Administrative costs to the contractors are caused by the DBA's reporting and record-keeping requirements.[195] The 1983 CBO study estimated that the reporting requirements of the Act added 0.2% to the cost of federal construction.[196] This results in an annual cost of $94 million. A 1972 study by the Associated General Contractors of America estimated that the reporting requirements added 0.5% to construction costs.[197] Applying this figure to the $47 billion in construction for FY 1992 results in an annual cost of $235 million.

The DBA also imposes administrative costs on the contracting agencies which must incorporate its requirements into its contracts and which have the primary responsibility for its enforcement.[198] In an effort to try to quantify a part of these costs, the author mailed surveys to 245 activities throughout the Department of the Army (including the United States Army Corps of Engineers activities), the Department of the Navy, the Department of the Air Force, and the Defense Logistics Agency (DLA). The survey asked the recipients to estimate the amount of time that the activitys' contracting personnel spent on DBA-related matters, both before and after contract award. Using a weighted average of the responses, the author determined that these activities spent five hours on preaward DBA matters[199] and forty-four hours on postaward DBA matters.[200] This is a total of forty-nine work hours for every DBA-covered con-

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[194] *Id.* Section 104 of the DOL Appropriation Act for FY 1994 (Pub. L. No. 103-112) prohibits the DOL from expending funds to implement the new regulations expanding the use of helpers. These regulations were first published in the *Federal Register* on January 27, 1989. Because helpers cannot be used, the estimated 1.6% increase cost must be factored into the total cost impact of the DBA.

[195] *See supra* text accompanying notes **61-64** for a discussion of these requirements. Contractors usually include these costs as part of their bid for a project. Therefore, these costs also could be considered a direct cost of the DBA.

[196] CBO STUDY, *supra* note 174.

[197] THIEBLOT, *supra* note 15, at 80.

[198] *See supra* text accompanying notes 65-71.

[199] That this number is fairly low is not surprising because most activities rely on the area wage determinations issued by the DOL. ***See*** *supra* text accompanying note 50. Therefore, preaward DBA actions generally consist only of incorporating the correct wage determinations and contract clauses into the solicitation.

[200] This figure, for the most part, includes only the time spent by contracting personnel on the DBA's postaward requirements. It does not include the time spent by inspectors and others engaged in enforcement activities.

tract.[201] In FY 1994, the DOD awarded 9766 contracts subject to the DBA.[202] Therefore, it can be estimated that Department of the Army personnel spend a total of 478,534 work hours on DBA-related matters annually.[203] The average grade of contracting personnel who would work on DBA-related matters is GS-12.[204] Therefore, the DOD's cost (in terms of labor costs alone) of administering the DBA can be estimated to be approximately $12 million per year.[205]

3. Social impact—The previous discussion has focused on the dollar impacts of the DBA. However, some commentators have noted that the DBA also has adverse social consequences, such as restricting the opportunities for minorities and youth in construction because of the rules regarding apprentices, helpers, and trainees.[206]

In addition to these impacts, it appears that the current administration of the DBA may make it more difficult for local contractors and their workers to obtain DBA-covered work. For example, local open shop contractors have to change their labor supply, organization, and methods of using and compensating employees to comply with the DOL's union-oriented job classifications.207 The GAO also has commented on the DBA's effect in this regard:

> The inflated wage costs may have had the most adverse effect on the local contractors and their workers—those the act was intended to protect—by promoting the use of nonlocal contractors on Federal projects. Nonlocal contractors worked on the majority of these projects, indicating that the higher rates may have discouraged local contractors from bidding.[208]

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[201]Because of the limited survey size and the method of estimation used, this figure is only an estimate. However, it should provide an order of magnitude estimate of the amount of time involved.

[202]Telephone interview with Mr. Tim Vondergraf, Data Analyst, Directorate for Information Operation and Reports, Department of Defense, Washington Headquarters Services (Aug. 7, 1995) bereinafter Vondergraf Interview].

[203]This figure is the result of multiplying the 49 work hours estimated from the survey results by the 9766 DBA-covered contracts that the DOD awarded in FY 1994.

[204]Telephone Interview with Mike Cummins, Career Management Directorate, United States Army Personnel Command (Mar. 25, 1994).

[205]A GS-12, step 7, employee is paid $26.78 per hour, including fringe benefits. Telephone interview with Richard Potter, Budget Analyst, TRADOC Contracting Activity (Mar. 22, 1994).Multiplying this figure by the 478,534 work hours estimated to be expended on DBA-related matters results in the total cost estimate.

[206]*See* THIEBLOT, *supra* note 15, at 47; GOULD & BITTLINGMAYER, *supra* note 18, at 62.

[207]THIEBLOT, *supra* note 15, at 46.

[208]DBA REPEAL, *supra* note 178, at iv.

Recent congressional testimony also discussed the impact of the DBA on small local contractors.[209] Ms. Sara Jean Lindholm, the head of a Chicago community redevelopment firm, explained the impact of the DBA in her area:

> [A] major intent of the Davis-Bacon Act was to ensure that federal contracts reflect the local labor market, which should not be disrupted by the importation of outside labor. However, from the vantage point of the inner city, implementation of the act today leads to exactly the reverse outcome and denies neighborhood residents the opportunity to work on projects that are designed to redevelop their own communities.[210]

Ms. Lindholm went on to compare the wages paid by a well-established inner-city contractor to the DBA rates for the area and noted that the DBA rates "run from 23% to nearly 70% higher."[211] She then described the consequences of using this firm on several DBA-covered projects:

> [Tlhe efficacy of the firm's crews was almost irreparably damaged in the process. Work crews which had effectively partnered the highest skilled workmen with those who were less experienced had to be split up. Most of the crews found it incomprehensible that some individuals would be paid dramatically more for doing comparable work at a different site. Payroll procedures became unbearably complex. A laborer might be paid $10.00/hour for half a day at one site and then over $19.00[/hour] for the rest of the day at the Davis[-]Bacon site. Over-all, the process created confusion, suspicion, animosity, and competition among members of the crews with consequent discipline issues and high staff turnover.[212]

As a result, this local contractor will no longer work on DBA projects. Ms. Lindholm's firm now uses only large city-wide contracting firms (and one out-of-state firm) for its DBA-covered rehabilitation projects.[213]

There is one last example which not only illustrates the social

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[209] *Hearing on H.R. 1231, the Davis-Bacon Reform Bill of 1993, Before the Subcomm. on Labor Standards, Occupational Health and Safety of the House Comm. on Education and Labor,* 103d Cong., 1st Sess. (1993) (statement of Sarah Jean Lindholm).

[210] *Id.* at 57.

[211] *Id.* at 59.

[212] *Id.* at 60.

[213] *Id.*

consequences of the DBA, but also demonstrates its direct cost impacts. When introducing Senate Bill 1228,214which called for the repeal of the DBA, Senator Hank Brown referred to the town of Philomath, Oregon. According to Senator Brown, the residents of this town raised over $600,000 to build a community library which they planned to construct partly with volunteer labor. However, because the project was to be financed in part with federal funds, the DBA applied and prevailing wages had to be paid to all workers on the project. The town had to abandon the library because of the increased cost attributed to DBA coverage.[215] It is unlikely that the original supporters of the DBA in Congress would have envisioned—much less supported—such a result.

4. Continued Need *for* the *DBA's* Protections—In 1931, when the DBA was enacted, the conditions fostered by the Great Depression arguably required some type of protection for the wages of construction workers. However, it does not appear that any such protection is needed today. In his study of the DBA, Dr. Thieblot noted that in 1975, DBA-covered construction accounted for approximately forty percent of the construction activity in the United States.[216] Therefore, sixty percent of the construction is built purely on competitive bidding with the contract being awarded to the lowest bidder.[217] In the private sector, union and open shop firms compete effectively against each other.[218] There is no evidence that out-of-town contractors bringing in cheap itinerant labor are driving down local labor rates.[219] The GAO confirmed these findings in its study of the DBA, "We found no indications, and [the DOLI did not present any evidence, of an adverse effect on or exploitation by contractors of the estimated 3.0 million workers employed on construction projects not covered by the act."[220]

Bureau of Labor Statistics figures for November 1992 show that the average hourly and weekly pay for construction workers was $14.17, and $531.38, respectively.[221] These were the second

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[214]S. 1228, 103d Cong., 1st Sess. (1993).

[215]*See* 139 CONG. REC. S8718 (daily ed. July 14, 1993) (statement of Sen. Brown). The FASA, §§ 7301-7306, amended the DBA to exempt from the **Act's** coverage volunteer workers under these circumstances.

[216]THIEBLOT, ***supra*** note **15,** at 151-52.

[217]*Id.*

[218]*Id.*

[219]*Id.*

[220]DBA REPEAL, ***supra*** note 178, at 17.

[221]HEARINGS ON H.R. 1231, THE DAVIS-BACON REFORM BILL OF 1993, BEFORE THE SUBCOMM. ON LABOR STANDARDS, OCCUPATIONAL HEALTH AND SAFETY OF THE HOUSE COMM. ON EDUCATION AND LABOR, 103D CONG., 1ST SESS. 33 (1993) (statement of the Associated General Contractors of America).

highest rates (behind mining) in the eight industrial sectors of the economy surveyed.[222] Based on these figures, it does not appear that the wages of construction workers need any protection.

The DBA is expensive in terms of direct and administrative costs. Additionally, it appears to be hurting the very workers it was designed to protect. Finally, these workers no longer need the protection that the DBA was originally intended to provide.

C. The Service Contract Act

Much less information is available on the impacts of the SCA. The information that is available, however, clearly leads to the conclusion that the SCA is expensive, difficult to administer, and increases the direct costs of services provided to the government. The following will discuss the direct and administrative costs associated with the SCA as well as the continued need for the protections that the SCA provides.

1. Direct Costs—As with the DBA, the direct costs associated with the SCA are measured in terms of difference between the prevailing rate established by the DOL and the rates that are available in the open market. In 1990, testimony before Congress and the General Services Administration (GSA) provided examples of ten cases where the prevailing rates established by the DOL were higher than the rates that the GSA found prevailing in the area.[223] The GSA found that the DOL's prevailing rate exceeded the rates in the area by as much as eighty-two percent.

In its study of the SCA, the GAO compared the DOL's prevailing rates to rates that it determined based on its own surveys of localities.[224] Using several different methods of calculation, the GAO determined that the DOL's rates exceeded the rates in the area by 24.5 to 31.5%.[225] The GAO stated that the DOL's "inflated rates could be adding hundreds of millions of dollars annually to Federal service contract costs."[226]

2. Administrative costs—Apparently, there has not been any

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[222] *Id.*

[223] OVERSIGHT HEARING *os* THE FEDERAL SERVICE CONTRACT ACT BEFORE THE SUBCOMM. OS LABOR STANDARDS OF THE HOUSE COMM. ON EDUCATION AND LABOR, 101st Cong., 2d Sess., 184, 207-11 (1990). The GSA based its determination of the prevailing rate primarily on Bureau of Labor Statistics data.

[224] UNITED STATES GENERAL ACCOUNTING OFFICE, THE CONGRESS SHOULD CONSIDER REPEAL OF THE SERVICE CONTRACT ACT 33-40 (19831.

[225] *Id.*

[226] *Id.* at iii.

attempt to quantify the administrative costs associated with contractors' compliance with the SCA. However, because the SCA does not incorporate the Copeland Anti-Kickback Act's requirements for submission of weekly payroll reports, the cost to contractors of complying with the SCA should be substantially less than that for complying with the DBA.[227]

There is a similar lack of information on the SCA's administrative cost to the contracting agencies. The author's survey included questions concerning time spent on SCA matters in an attempt to estimate SCA costs incurred by the government.[228] Using weighted averages of the responses, the survey shows that the responding activities spent eight hours on preaward SCA matters and twenty-seven hours on postaward SCA matters. This results in a total of thirty-five work hours per covered contract. The DOD awarded 19,842 contract actions subject to the SCA in FY 1994.229Therefore, it can be estimated that approximately 694,470 work hours per year are spent on SCA-related matters by DOD contracting personnel.[230] The average grade of contracting personnel who would deal with SCA matters is GS-12,[231] so the labor costs associated with SCA compliance for the DOD is approximately $19 million per year.[232] In response to a Freedom of Information Act request from the author, the DOL stated that it issued 53,401 SCA wage determinations in FY 1993.233Applying the work hour and salary figures stated above to this figure results in a government-wide labor cost of $50.1 million per year associated with SCA administration.

3. Continued Need for the SCA's Protection—Unlike the construction workers covered by the DBA, the service workers covered by the SCA are a very diverse group. Classifications of covered service employees may range from janitors and sanitation workers to

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[227]*See supra* text accompanying notes 196-97 for a discussion of the cost of compliance with these requirements.

[228]*See supra* text accompanying note 199 for a discussion of the survey methodology.

[229]Vondergraf Interview, *supra* note 202.

[230]This figure is the product of multiplying 35 work hours per contract by 19,842 contracts. This figure is only an approximation of the amount of time spent on SCA-related matters. A lengthy, and costly, research effort would be required to obtain a more accurate estimate of the amount of time actually spent. However, this figure presumably represents an order of magnitude approximation.

[231]*See supra* note 204.

[232]This figure is the product of multiplying $26.78, the hourly salary, including fringes, for GS-12 employees by 694,470 work hours. **See** *supra* text accompanying note 204 regarding the use of the GS-12 grade. Again, this figure is only an approximation of the actual costs. **See** *supra* note 230.

[233]Letter from Maria Echaveste, Administrator, Employment Standards Administration, Wage and Hour Division, United States Department of Labor, to the author (Feb. 23, 1994)(on file with author) hereinafter DOL Letter].

doctors and lawyers.[234] On the one hand, it can be argued that the service employees on the higher end of this wage spectrum do not need the SCA's protection.[235] Alternatively, with respect to the lower end of this wage spectrum, the same concerns that led to the passage of the SCA in 1965 would be equally justified today.[236] Lower paid employees, such as janitors and gate guards, working at scattered locations and at odd hours, often cannot obtain the leverage of union representation, and could, therefore, still be at the mercy of unscrupulous employers willing to cut wages to the bare minimum in order to win a government contract.

There is, however, one significant difference in government contracting procedures today versus those procedures in place at the time of the SCA's enactment. In 1965, there was a statutory preference for sealed bid procurements.[237] This meant that almost all service contracts were awarded to the lowest bidder who, all other things being equal, most likely achieved that low bid by cutting wages paid to his employees.[238] With the passage of the Competition in Contracting Act,[239] however, this statutory preference for sealed bidding was eliminated.[240] Under current law, sealed bidding is to be used only when four factors are met, in all other cases, negotiated procedures must be used.[241] Contracting agencies have the discretion to structure their procurements so that negotiated procedures can be used.[242] While contracting agencies must consider price in their award decisions,[243] price need not be the determinative factor.[244] Therefore, contracting agencies could structure their procurements so that the wages a contractor proposes to pay its employees, and the experience level of its proposed work force, are factors to be considered in making the award of the

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[234]Professionals such as doctors and lawyers, when under contract to the government, usually are exempt from the Act's coverage. However, under some circumstances, the Act may even apply to these persons. *See supra* notes 78-79 and accompanying text for reference to the procedures for making this determination.

[235]*See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, SERVICE CONTRACT ACT SHOULD NOT APPLY TO SERVICE EMPLOYEES OF ADP ASD HIGH TECHNOLOGY COMPANIES (1980).

[236]*See supra* text accompanying notes 30-33 for examples of these arguments.

[237]JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 387 (1986).

[238]*See supra* note 32.

[239] Pub. L. No. 98-386, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 10 and 41 U.S.C.).

[240]CIBINIC & NASH, *supra* note 239, at 387.

[241]*Id.*

[242]*See* FAR, *supra* note 46, 6.401.

[243]10 U.S.C. § 2305(a) (1988); FAR, *supra* note 46, 15.605(b).

[244]*See, e.g.*, DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 15.605(d) (Dec. 1,1984).

contract.[245] This concept is similar to that used to protect the wages of professional employees who are exempt from SCA coverage.[246] Such an approach would result in added costs as a result of the requirement for additional work on the part of contracting personnel.[247] However, these additional costs would be more than offset by the cost savings achieved by eliminating the requirements associated with the SCA. If the SCA were repealed, Congress could require changes to the applicable procurement regulations which would require contracting agencies to evaluate contractor proposals to ensure that the wages the contractor proposes to pay its employees are reasonable. Contractors proposing unreasonably low compensation for their employees could be eliminated from consideration for award of the contract.[248]

Like the DBA, the SCA also is expensive and difficult to enforce and administer. Those who support retention of the SCA may argue that service workers at the bottom end of the pay scale need the continued protection of the Act. However, these workers could be adequately protected by the changes to the procurement regulations described above.

D. DOL Administrative Costs

Another significant cost impact of the DBA and SCA is related to the costs that the DOL incurs in carrying out its responsibilities under both Acts. In response to the author's Freedom of Information Act request, the DOL stated that its Wage and Hour Division[249] employed **1333** full-time employees during FY 1993.[250] The average

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[245]Prior to the passage of the SCA, some contractors would achieve lower bids by hiring only inexperienced employees to whom they could pay entry level wages. This often resulted in a complete turnover of personnel every time a new contract was awarded. This practice was often highlighted as one of the factors supporting the need for protections such as those included in the SCA. See *supra* discussion accompanying note 36.

[246]*See supra* notes 78-79 and accompanying text for a discussion of professional employee compensation.

[247]Additional clauses would have to be added to solicitations for service contracts. Furthermore, evaluation of the contractors' proposed compensation would require additional time and effort on the part of contracting personnel.

[248]As noted above, this approach requires additional effort on the part of contracting personnel. However, it does have offsetting advantages. First, it allows the government to assure itself that it is getting quality service employees by requiring the contractors to pay adequate wages. Second, it eliminates all of the requirements associated with the SCA, saving both the contractors and the government time and money.

[249]This is the division of the DOL responsible for issuing DBA and SCA wage determinations and for enforcing both Acts.

[250]DOL Letter, *supra* note **233.**

grade of employees in the Wage and Hour Division is GS-11.[251] While the costs associated with this staff could not be totally eliminated by repeal of both Acts, significant reductions could be achieved.[252]

VI. Conclusion

During the Great Depression, Congress saw the need for some type of legislation to protect the wages of workers. The DBA was the means that Congress chose to protect those in the construction industry. While the merits of this approach are debatable, it would be difficult to argue that the circumstances of the Depression did not warrant some kind of action. However, with the end of the Depression the need for legislation such as the DBA also ended. In the sixty-three years since its enactment, the failings and added costs of the prevailing wage concept have become abundantly clear. Because of these failings, it is nearly impossible for the DOL to accurately determine what wages prevail in a given locality. Numerous studies have shown that the DOL's prevailing wages often exceed—sometimes significantly—the wages actually paid in the locality. This inflation in wage rates adds billions of dollars annually to the cost of federal construction. In addition to these costs, the costs incurred by contractors in complying with the reporting and recordkeeping requirements of the Act amount to several hundred million dollars per year. Because these costs almost always are passed on to the government, they also add to the cost of federal construction. Finally, the cost to the government of its own administration of the Act must be included. In total, the government spends several billion dollars per year as a result of DBA requirements. This is money for which the government receives no direct benefit and which could otherwise be spent for additional construction projects.

In addition to its cost, the DBA also may create barriers to the entry of youth and minorities into construction fields because of its stringent rules regarding the use of helpers, trainees, and apprentices. The recordkeeping and reporting requirements of the Act also may provide a barrier to the entry of small local firms into the market for federal construction. It appears that the DBA actually is harming the very people it was intended to protect. Finally, statistics showing the wages paid in the construction industry as a whole

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[251] *Id.*

[252] Salaries are not the only costs associated with the operation of the Wage and Hour Division.

lead to the conclusion that construction workers do not need the protection of laws such as the DBA.

The proposals to raise the threshold at which the Davis-Bacon Act would apply would help to alleviate these problems. However, these proposals do not go far enough. That the Davis-Bacon Act has long outlived any benefit it may have provided is clear. It has become an anachronism America can no longer afford. Congress should repeal the Act immediately.

By the time Congress enacted the SCA in 1965, it should have been clear that the prevailing wage concept simply does not work. However, Congress—believing that those working on government service contracts needed wage protection—chose to apply the concept once again. As with the DBA, it is nearly impossible to determine with any accuracy the wages which prevail in a given area. This causes the government to pay millions of dollars in additional costs every year on its service contracts. The government does not receive any direct benefit for this cost.

Congress also should repeal the SCA. However, some workers at the lower end of the service industry pay scale may fall victim to unscrupulous employers attempting to pay substandard wages in an attempt to win government contracts. To avoid this possibility, Congress should consider a revision to the procurement regulations which would require contracting personnel to evaluate the contractors' proposed wages. If contracting personnel determine that the wages are not reasonable, the contractor would be eliminated from consideration for award of the contract. This approach would provide protection for service workers while eliminating the burdensome and costly requirements of the SCA.

Congress enacted both the DBA and SCA with a noble purpose in mind. However, the DBA has outlived its usefulness and the SCA probably never was needed. In these times of budget tightening, it is unwise to retain two Acts that cost the government billions of dollars annually and provide no benefits in return.

UNABSORBED OVERHEAD COSTS AND THE *EICHLEAY* FORMULA

MAJOR JEFFREY W. WATSON*

I. Introduction

A government contracts attorney should know what costs contractors can assess against a government contract. This article will present a user-friendly guide to unabsorbed overhead costs with the aim of clarifying what initially may appear as an enigma. Trepidation and "sweaty palms" may greet the contract law attorney who does not understand unabsorbed overhead costs. However, unabsorbed overhead cost is both comprehensible and recoverable.[1]

What happens when a contracting officer informs you that the construction project at your installation needs to be suspended temporarily? What advice do you give? What is the government's liability when it suspends contractor performance? How are equitable adjustments measured? Although this article will touch on all of these issues, it will focus on the formula to use in measuring unabsorbed overhead costs.

To understand this subject, the article begins with an historical overview of home office[2] expense as an unabsorbed overhead

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[1] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.105(c) (25 Feb. 1992) [hereinafter FAR].

[2] *Id.* 31.001.

> "Home office" means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to, the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

Id.

cost. Then, it describes various formulas used to calculate these costs. Finally, it covers the current case law since the Federal Circuit decision in *Wickham Contracting* Co. *v. Fischer*[3] which decreed that the *Eichleay*[4] formula was the only proper method to use in government contracts.

11. Historical Perspective on Unabsorbed Overhead Costs

Fifty years ago, in the seminal case of *Fred* R. *Comb Co. v. United States*,[5] the Court of Claims held that the government was liable to the contractor for damages caused by delay. The court found that the contractor suffered damages awaiting the conclusion of a property dispute. The contractor submitted its costs, including overhead expense, for the suspension period. The government denied these costs.[6]

At that time, the key to allowability of costs depended on whether the contract granted authority to adjust the contract price. For the government, it mattered not that its conduct caused the additional expense incurred by the contractor. Accordingly, the contractor sought relief in the Court of Claims.

For the first time, the court laid the foundation for the payment of unabsorbed overhead costs. The government contested an allowance of any main (home) office overhead. Further, a court commissioner found no proof of the additional office overhead. The court held it immaterial and reasoned that it was unlikely that a contractor would enlarge his home office staff and facilities during a suspension period. It noted further, however, that if the contractor laid off some of its employees during this period, it would be material.[7] It would be material because that is an overhead expense.

The court explained that laying off home office employees during a suspension period of short and indefinite duration ordinarily is impractical. Finding that a contractor is forced to waste the salary of home office staff during a period of suspension, the court finally held "the Government, having breached its contract, has no

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[3]12 F.3d 1574, 1581 (Fed. Cir. 1994).

[4]Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688.

5103 Ct. Cl. 174 (1945).

[6]*Id.* at 183. "It is a breach of contract for the owner to negligently involve a contractor in the problems and delays of a litigation about the site of the work is a breach of contract." *Id.*

[7]*Id.*

right to say, in effect, that its breach shall go uncompensated unless the contractor proves, with precision, what is usually not susceptible of such proof."[8]

Understanding the court's analysis is important because it provides the framework for relief used today. Current cases involving overhead recognize that home office expenses continue during the suspended period. This cost is called an indirect cost[9] and, generally, many of these costs are allowable.[10]

The Court of Claims's holding is significant because it was a change from previous court rulings. In a case decided four years earlier,[11] the Court of Claims also held that the claimants were entitled to a portion of overhead costs. Unfortunately, the court failed to articulate the formula used to calculate costs.[12] The holding was proper because payment of a pro rata portion of a contractor's allowable overhead cost more equitably compensates the contractor. In *Rust Engineering Co. v. United States*,[13] the Court of Claims linked actual damages to the direct costs of the contract. There was more

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[8]*Id.* at 184 (citation omitted].

[9]FAR, *supra* note 1, at 31.203, which states:

> Indirect costs.
>
> (a) *An* indirect cost is any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective.".

A cost objective often is the contract, *see id. 31.001.*

[10]*Id.* 31.203(b) ("Commonly, manufacturing overhead, selling expenses, and general and administrative (G&A) expenses are separately grouped."). *See also id.* 31.204(a):

> Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203 and 31.205. These criteria apply to all of the selected items that follow, even if particular guidance is provided for certain items for emphasis or clarity.

"Herbert M. Baruch Corp. v. United States, **93** Ct. Cl. 107 (1941).

[12]*Id.* at 125-26.

> It has been necessary to apportion some of the items of cost which attached to the entire contract and to allot the proper part of these items to Buildings 1 and 2 and work dependent thereon and incident thereto. As to the general office overhead, the evidence shows that the plaintiff company engaged in other construction work at the time the contract work involved in this litigation was being done. These, however, were comparatively small contracts. . . . We have, therefore, apportioned the general office overhead and allotted the *proper* part of same to this particular contract. In turn, we have allotted the *proper* part of the net result thus obtained to the unforeseen delay in connection with the construction of Buildings 1 and 2.

Id. (emphasis added).

[13]86 Ct. Cl. 461 (1938).("Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. On the facts disclosed, plaintiff is entitled to recover on this item. But its recovery must be limited to the *actual* extra costs incurred without profit.") *Id.* (emphasis added).

formality in the requirements of proof. Particularly, the court relied on the strict language of the contract.

A more draconian view can be found in Levering & Garrigues Co. *u.* United *States*.[14] The contract allowed compensation for increased direct labor and material charges based on changes to the contract.[15] However, the Court of Claims did not allow indirect costs,[16] and suggested that the contractor should anticipate delay.[17] The court applied its holding in Moran Brothers Co. *u.* United *States*,[18] that "if the defendant were made liable for consequential and other damages attributable to delays resulting from changes, the result would be either that the stipulated right to make changes was not effective or that the cost of the vessel might be vastly increased."[19] This restrictive view could work a hardship for government contractors. Before 1940, entering a contract with the government apparently was at the financial peril of the contractor. Unless expressly permitted by the contract, the contractor could not recover consequential damages for government delay.

Quoting McCord *u.* United *States*,[20] the Court of Claims explained the government's right to demand such harsh results:

> This privilege of the United States to make alterations on the terms stated being expressly provided for in the contract, the contract price related to that privilege as much as to any other provision in the contract, and therefore it must be taken as included in that price, and paid for in it.[21]

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[14] 73 Ct. C1.508 (1932).

[15] *Id.* at 515.

> Paragraph 17 of the general provisions of the specifications provides that the Government reserves the right to make such changes in the contract . . . as may be deemed necessary or advisable . . . . The cost of the changes as ascertained . . . shall be added to or deducted from the contract price, and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract.

Id.

[16] *Id.* at 521. ("The plaintiff. . . is not entitled to recover the sum of. . . $300, its cost of superintendence and clerk hire for the three weeks the work of driving piling overran the progress schedule."). The court found that the government did not delay construction to any "appreciable amount."

[17] *Id.* at 523. ("The provision of the contract authorizing changes, carried with it the reasonable implication that if such changes were made, delay in the prosecution of the work might result.").

[18] 61 Ct. Cl. 73, 102 (1925).

[19] *Levering,* 73 Ct. Cl. at 523. "It was never contemplated [either by the statute or] by the contract that delays incident to changes would subject the Government to damage beyond that involved in the changes themselves." *Id.*

[20] 9 Ct. Cl. 155, 169 (1873).

[21] *Levering,* 73 Ct. Cl. at 523.

The deeper one digs into the case law, the more strictly construed are the cases against contractors.

The government's position was that it has paid for the right to alter the terms of a contract. Additionally, if the claimed damages cannot be proved, no grounds for recovery exist. Against this historical backdrop, the court's decision in ***Fred** R. Comb,* granting the contractor unabsorbed overhead costs. is all the more remarkable.

III. Terminology

Before going further, some basic terms require definition. Direct costs are those costs identified with one cost objective,[22] while indirect costs are those that are identified with two or more cost objectives or an intermediate cost objective.23A cost objective24 is often a contract, although not all cost objectives are contracts. For example, if a manufacturer has two different plants **(A** *& B*) producing a particular item, the two separate plants can be considered intermediate cost objectives within the company. If an indirect cost cannot be identified with a particular segment (e.g., state income tax, where plant **A** is in Georgia and plant *B* is in New York), then the indirect cost may be attributed to the segments as intermediate cost objectives. The cost objectives in this case are the intermediate segments **(A** *& B*), not contracts.

What does it mean to identify a cost with a cost objective? To reimburse the contractor its costs, the costs must be allocable and allowable. The total cost, generally, is the sum of allowable direct

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[22]FAR, *supra* note **1,**31.202. Direct costs are defined as follows:

> (a) **A** direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

Id.

[23]*Id.* 31.203.

[24]*Id.* 31.001. ("'Cost objective,' as used in this part (other than Subpart 31.61. means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes. products, jobs, capitalized projects, etc."). *Id.*

and indirect costs allocable to the contract, either incurred or to be incurred.[25]

Regarding allocation, group indirect costs logically and reasonably based on the benefit provided to the cost objectives.[26] For example, overhead, direct labor hours and General and Administrative (G&A) expenses are grouped separately. Likewise, if the group is further subdivided, then the expenses collected in that group must be expenses common to all cost objectives to which those indirect costs are allocated (e.g., state income tax for Georgia cannot be allocated to plant *B* in New York). Lastly, once an appropriate base has been established, all items in the base should bear a pro rata share of indirect costs, regardless of whether they are allowable as government costs.[27]

Once a cost has been allocated, the contractor must consider whether it is allowable before requesting reimbursement from the government. Generally, a cost is allowable to the extent that it is reasonable, allocable and allowable. The cost principles in the *Federal Acquisition Regulation* are a guide to allowability.[28]

These terms should give the practitioner a fundamental grasp of where unabsorbed overhead costs fit in the overall contracting scheme. If there are no contracts other than the delayed government contract against which costs are allocated, the need to recoup unabsorbed overhead expenses becomes critical. A contractor cannot remain in business for long if it is not reimbursed for overhead expenses. In *Fred R. Comb,* once the Court of Claims found that unabsorbed overhead costs were recoverable, the boards and courts needed to develop a formula for recovery.

IV. Determining Recovery: The Formulas

Recovery of unabsorbed overhead often results from the sus-

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[25] *Id.* 31.201-1. Composition of total cost is defined as follows:

> The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits, plus any allocable cost of money pursuant to 31.205-10. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used, including standard costs properly adjusted for applicable variances.

Id. ***See*** *id.* 31.201-2(b) and (c) for Cost Accounting Standards (CAS) requirements.

[26] *Id.* 31.203(b).

[27] *Id.* 31.203(b), (c).

[28] *Id.* 31.204.

pension, delay, or disruption of contract performance.29 However, in many cases contractors do not recover for a variety of reasons—such as their failure to mitigate damages. Although the recovery of overhead most often is considered in construction contracts, it also has been considered in manufacturing and supply contracts.30 "Home office overhead" is a term used to describe those expenses not directly attributable to a project.31 The courts and boards have followed three different formulas over the years, usually based on the type of contract.32

A. The Carteret Method

This method derives its name from Carteret *Work* Uniforms33 and was used in a manufacturing contract by a contractor with only one contract, the government contract. The contractor was to manufacture overcoats from government-furnished sateen. The Armed Services Board of Contract Appeals (ASBCA) computed the adjustment for unabsorbed overhead by applying the manufacturing overhead rate to the direct labor dollars to determine anticipated manufacturing overhead for the delay period. That amount was then sub-

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29*Techniques for Applying Eichleay Overhead Recovery to Manufacturing Contracts*, 63 Fed. Contracts Rep. (BNA) 104 (1995) [hereinafter *Eichleay Techniques*].

30*Id. See also Costs & Pricing*, 8 NASH & CIBINIC REP., NO. 8, Aug. 1994, ¶ 45.

31*Eichleay Techniques*, *supra* note 29.

32RALPH C. NASH, JR., GOVERNMENT CONTRACT CHANGES, 17-12 to -14 (1989).

33Carteret Work Uniforms, ASBCA No. 1647, 6 CCF ¶ 61,561.

> Contractor was a comparatively small concern and it originally planned, if necessary, to devote all its manufacturing facilities to the performance of this contract. No other work was done in its plant from the award of the contract until it was completed, a period of approximately nine months.
>
> The manufacturing overhead rate is the ratio of the total manufacturing overhead dollars to direct labor dollars.

Id.

In this case, the anticipated manufacturing overhead for three months was $19,784.16. The actual manufacturing overhead costs during these same three months was $33,166.07. The difference between the anticipated overhead cost and the actual overhead cost was recoverable against the government because it was the government that caused the contractor to incur delay in manufacturing.

The government argument was that actual overhead was not recoverable because the contractor finished the contract within the period of contract performance. This does not consider additional expenses incurred by the contractor by accelerating performance to finish within the contract period. That is, in November and December, the scheduled delivery amounts of overcoats was 2,539 and 2,345 respectively. The actual number of overcoats delivered during this period was 5,520 and 4,030 respectively. The board found that the contractor was entitled to recover the difference between the anticipated overhead and the actual overhead because it was the only contract performed by the Contractor.

tracted from the actual overhead rate during the delay period to determine the amount of recovery.

According to Professor Ralph C. Nash, Jr., this is the proper method to use for manufacturing cases.[34] He caveats his opinion by stating that the Carteret Method should be used cautiously because it is based on narrow assumptions. That is, if there is other work being performed during the delay period, the formula "assumes" that the other work is progressing normally.[35] However, this assumption appears to be faulty. How likely is it that only the government will cause delay?

B. The Allegheny Method

According to Professor Nash, Allegheny Sportswear *Co.*[36] used a different approach to recover unabsorbed overhead. Professor Nash described this as a "supply contract"[37] case. The formula is the "difference in overhead rates between the actual period of performance and the originally expected period of performance."[38] Thus, the excess overhead rate is multiplied by the contract base costs to determine the unabsorbed overhead amount. Professor Nash suggests that this is a rough estimate "since the two periods are intermixed . . . and the excess overhead is calculated on the costs of the contract . . . ."[39] Multiplying the difference in overhead rates, if any, by the contract base costs allocates overhead to the one contract.

C. The Eichleay Method

The method used most often by boards and courts to determine the appropriate adjustment for unabsorbed overhead costs is the formula from Eichleay *Corp.*[40] According to Eichleay, unabsorbed overhead costs are computed by dividing the contract billings by the contractor's total contract billings and multiplying that ratio by the total overhead costs incurred during the contract period to determine the overhead allocable to the delayed contract. The allocable overhead is then divided by the actual days of contract performance to determine the daily contract overhead. That amount is then mul-

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[34]NASH, *supra* note 32, at 17-13. It is an appropriate formula for manufacturing contracts, but it must be used with great care since it is based on such narrow assumptions.

[35]*Id.*

[36]ASBCA No. 4163, 58-1 BCA ¶ 1684.

[37]*See* NASH, *supra* note 32, at 17-13.

[38]*Id.*

[39]*Id.*

[40]*Id.*

tiplied by the number of days of delay to yield the unabsorbed overhead.[41]

For example, contract **A** billings ($1000) divided by total contract billings ($10,000) multiplied by total overhead ($2000) equals the overhead allocated to contract **A.** The allocable overhead ($200) is then divided by the actual days of contract performance (300 days) to determine the daily contract overhead which equals $.66 per day. Assuming 100 days of delay, the daily contract overhead is then multiplied by the number of days delay ($.66/day X 100 days = $66) to yield the unabsorbed overhead.

This formula is used primarily to calculate unabsorbed home office expenses on construction contracts.42 In *Eichleay,* the government challenged this method. It contended that no overhead rate increase had been proved during the suspension period. The board responded that "overhead costs, including the main office expenses . . . cannot ordinarily be charged to a particular contract."[43] The board went on to explain that "[i]t is therefore necessary to allocate [costs] to specific contracts on some fair basis of proration. While the overhead rate did not increase during the performance of these contracts, it is not questioned that the main office expense continued during the periods of suspension."[44] The board concluded by finding the Eichleay Corporation used a realistic computation method.[45]

V. Is *Eichleay* Realistic, or Isn't It?

In 1984, in *Capital Electric Co. v. United States,*[46] the Federal Circuit reaffirmed the viability of *Eichleay.* The appellate issue concerned whether the contractor was entitled to recover extended overhead. If the contractor was so entitled, was *Eichleay* the proper method for calculating unabsorbed costs?[47] In *Capital Electric,* the

[41] Eichleay Corp., ASBCA No. 5183, 60-2 BCA at 13,568.

[42] NASH, *supra* note 32, at 17-14.

[43] *Eichleay*, 60-2 BCA at 13,574.

[44] *Id.*

[45] *Id.*, at 13,576.

[46] 729 F.2d 743 (Fed. Cir. 1984).

[47] *Id.* at 745.

> [The Board] had indicated that it will not permit recovery of extended home office overhead for periods of performance delay, suspension, or extensions of the contract work . . . . The board said that it would not accept the concept of compensable extended overhead, as opposed to underabsorbed overhead, and that the Eichleay formula is not a proper method of calculating underabsorbed overhead.

Id.

court found that the contractor could not take on any large construction jobs because of the *uncertainty* of the delays on its government contract. Accordingly, the court found the delay period compensable, and overruled the board.[48]

Circuit Judge Friedman filed a concurring opinion that articulated a different point. He opined that the government's argument does not withstand "penetrating analysis."[49] In essence, there should be no need to show that the contractor hired additional personnel *because* of the contract delay. Recall, if a cost can be attributed to only one cost objective, then it is a direct cost of that objective. As Judge Friedman said, "[b]y definition this type of overhead cannot be directly attributed to the performance of a particular contract."[50]

Capital Electric also is significant because the court discussed the terms that often are used in delay cases: unabsorbed or underabsorbed overhead and extended overhead. The former conditions occur when direct costs are either nonexistent (unabsorbed) or reduced (underabsorbed) because of delay. The court suggested that underabsorbed overhead is a *manufacturing* cost accounting term. The latter term, extended overhead, is "a concept unique to *construction* contracting."[51] Its premise is that extending the performance period will naturally increase the overhead.[52] But the direct costs also would be increased, therefore, there is no harm to the contractor. Because this is a construction case, the contractor sought extended overhead.

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[48] *Id.*

> Although these points have some degree of validity, we are not persuaded that they correctly reflect the concept of the Eichleay formula, at least as far as Capital is concerned. In this case, *compensable* delay was stipulated before the board. Moreover, Capital introduced unrebutted evidence that it could not have taken on any large construction jobs during the various delay periods due to the uncertainty of the delays and (except after the original contract period, when a major portion of the project had been completed and accepted) due to the limitation on its bonding capacity.

Id.

[49] *Id.* at 748.

> Although superficially plausible, the government's argument does not withstand more penetrating analysis based upon the theory on which extended office overhead is allowed as an element of delay damages. By definition this type of overhead cannot be directly attributed to the performance of a particular contract, yet it is an essential part of the contractor's total cost of doing business.

Id.

[50] *Id.* ("Metit is an essential part of the contractor's total cost of doing business. Some basis, therefore, must be found for allocating this total overhead among the various contracts in connection with which it is incurred."). *Id.*

[51] *Id.* at 745 n.3 (emphasis added).

[52] *Id.*

Does *Eichleay* apply to both unabsorbed overhead costs during a suspension and extended overhead? In *Williams Enterprises, Inc.*,[53] the United States Court of Appeals for the District of Columbia Circuit failed to see a distinction between overhead during a suspension and extended overhead when there is a delay.[54] *Eichleay* applies to both, although the net result may be different because the overhead rate will be different. The overhead rate is different in a scenario with extended overhead that includes a delay because the work continues over a longer period of time but at a reduced performance rate. This means that less labor dollars are allocated to the constant expense of overhead. The rate therefore is less than it would be if there were no delay. The description of extended overhead including a delay should more properly be described as a period of underabsorbed overhead.

Williams Enterprises did not provide much analysis on this point, rather it relied on previous case law such as *Capital Electric*.[55] This ruling must be distinguished from that in *Community Heating & Plumbing* Co., *Inc. v. Kelso*.[56] In that case, the court did not allow application of *Eichleay* to recovery of overhead costs in an extended performance case. The important distinction overlooked by the contractor is that there was no delay. That is, the contractor sought mechanical application of the *Eichleay* formu-

[53] Williams Enterprises, Inc. v. Sherman R. Smoot Co., 938 F.2d 230 (D.C. Cir. 1991).

[54] *Id.* at 235.

> Williams next argues that it is improper to apply the Eichleay formula when a project is extended, but not suspended. According to Williams, the theory underlying the Eichleay formula is that during a suspension, "there is no money coming in from work on the contract, and there is often uncertainty as to how long the suspension will last, which prevents the contractor from taking on other work while waiting to return to the project." Rep. Br. 15. That rationale, says Williams, does not support the application of the formula to work extensions. We fail to see the distinction. It may be true that when a project is extended (not suspended), the work will be ongoing and thus income from the project will continue to be applied to home office overhead costs. On the other hand, when work is extended, the project income will be spread over a long period of time and, consequently, less of the income may be allocated to home office overhead costs. Thus, an extended project—like a suspended project—may result in reduced income vis-a-vis overhead costs.

Id.

[55] *Id.*

> In any event, we need not engage in a full blown analysis of the economic assumptions behind the *Eichleay* formula. This circuit, like others, has been willing to apply the formula to work extensions like the one here. *See, e.g., George Hyman Construction Co.*, 816 F.2d at 758; Capital Electric Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984). Indeed, in *Capital Electric*, the government presented the same argument raised by Williams and that court expressly rejected it.

Id.

[56] 987 F.2d 1575 (Fed. Cir. 19930

la for continuing original and additional work that extended the contract period.[57] There are either unabsorbed overhead costs or there are underabsorbed overhead costs. Because the contractor in *Community Heating* was incurring direct costs related to the *additional* work, there was no unabsorbed or underabsorbed overhead.

In *C.B.C. Enterprises, Inc. v. United States*,[58] the Federal Circuit addressed this situation. In this case, the contractor appealed the Navy's denial of extended overhead for twenty-four days of *additional* work. The Federal Circuit noted that the case was not one of suspension, delay, or disruption of work. It also noted that the period of performance was known. Construing extension dogmatically, the contractor argued that it was entitled to compensation using *Eichleay* whenever government-caused suspension, delay or extension of contract work exists.[59] The Federal Circuit dis-

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[57] *Id.* at 1582.

> In the present case, Community's claim for home office costs arises out of contract performance involving continuous original and additional changes work rather than a suspension or hiatus in performance which would affect direct costs. There was no evidence that the contract changes resulted in a delay in performance which required Community to stand by idly and suspend its work.

Id.

[58] 978 F.2d 669 (Fed. Cir. 1992).

[59] *Id.* at 671.

> In CBC's view, using the Eichleay formula to calculate home office overhead for extended contract performance periods should be the rule, with only two exceptions: added work not extending the performance period and performance extensions involving added work equal to or greater than the original contract's daily rate of direct costs. In those circumstances, use of the parties' agreed percentage overhead rate would be appropriate because the direct cost stream has not been diminished. . . .
>
> By contrast, the government contends that the Eichleay formula is never appropriately applied to mere extensions of contract performance occasioned by contract modifications adding work to be performed. From the government's perspective, the general rule requires recovery of extended home office overhead under agreed percentage rates. The Eichleay formula, the government says, is an exception to that rule, and may only be applied where a contractor incurs extended overhead expenses as a result of government-caused delay, disruption or suspension of work.

Id.; see also id. at 673, where the Federal Circuit noted:

> Following the Eichleay Corp. decision, the Court of Claims approved award of overhead costs prorated on a daily basis in cases where the government caused disruption, suspension or delay during performance of the contract. *See, e.g., Luria Bros. & Co. v. United States,* 177 Ct. Cl. 676, 369 F.2d **701,** 706-07, 711 (Ct. Cl. 1966) (subsoil investigations meant the contractor was ordered to stop all pourings of footings so that the entire project substantially fell to a halt); *J.D. Hedin Constr. Co. v. United States,* 171 Ct. Cl. 70, 347 F.2d 235, 242, 245 (Ct. Cl. 1965) (no productive work accomplished for 11 weeks while pile driving operations were suspended pending decision of the Veterans Administration).

agreed with C.B.C.'s argument and explained that this was only part of the requirement. Furthermore, the contractor completely ignored the rationale behind the holding in *Eichleuy.* That is, recovery is permitted when a "cloud of uncertainty"[60] exists regarding the period of performance.[61] Furthermore, the contractor must show that it *cannot take on additional work* (to absorb the overhead).[62]

The Federal Circuit held that to use *Eichleay* in every instance would transform it into a rule rather than an exception and concluded by declining the "invitation to stand availability of the *Eichleuy* formula on its head."[63] Rather, it held that where there is no uncertainty for the contractor, *Eichleuy* is not appropriate to calculate unabsorbed home office overhead.[64]

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[60] *Id.* at 672.

> The Eichleay method of calculating extended home office overhead has a long history. As we shall see, contractors have been permitted to use this method to calculate extended home office overhead in situations where disruption, delay or outright suspension have cast a cloud of uncertainty over the length of the performance period of the contract.

Id.

[61] *Id.* at 674.

> This same element of uncertainty . . . has been present whenever the courts or the Boards of Contract Appeals have permitted extended home office overhead to be calculated under the *Eichleay* formula. See, *e.g.*, *Weaver-Bailey Contractors, Inc. v. United States,* 19 Cl. Ct. 474, 477, (1990) (government's inaccurate estimate caused delay that was unforeseeable and beyond control of the contractor); **A.A.** *Beiro Constr Co.,* 91-3 BCA ¶ 24,149, at 120,844 (ENGBCA 1991) (duration of delays uncertain so that contractor could not divert resources to other work); Cieszko Constr. Co., 88-1 BCA ¶ **20,223,** at 102,417 (ASBCA 1987) (contractor put off-site for six weeks while government procured appropriate doors; government caused further delays due to sludge removal). . . In all of these cases when disruption, suspension or delay caused by the government has reduced the stream of direct costs in a contract, it is appropriate to use the Eichleay formula to calculate extended home office overhead instead of the fixed percentage rate formula because the latter would not adequately compensate the contractor for extended home office overhead.

Id.

[62] *See id.* at 673, where the Federal Circuit stated the following:

> Then in 1984, this court refused to accede to the government's request to jettison use of the Eichleay formula to calculate such delay damages. *Capital Elec. Co.,* 729 F.2d at 747. Instead, this court approved the use of the Eichleay formula to calculate extended home office overhead under the suspension of work clause provided that compensable delay occurred, and that the contractor could not have taken on any other jobs during the contract period.

[63] *Id.* at 675. ("The *raison d'etre* of Eichleay requires at least some element of uncertainty arising from suspension, disruption or delay of contract performance. Such delays are sudden, sporadic and of uncertain duration. As a result, it is impractical for the contractor to take on other work during these delays.") *Id.*

[64] *Id.* Such a limitation on the use of the *Eichleay* formula is reasonable because, after all, the Eichleay formula only roughly approximates extended home office overhead. ***See*** *generally* 5 NASH & CIBINIC REP., NOV. 1991, ¶ 62, at 166.

Eichleay is a realistic means to allocate unabsorbed overhead and should not be "jettisoned."[65] Conversely, it should not be used where there is no uncertainty for the contractor. The Federal Circuit's refusal to make *Eichleay* a general rule is justified. Analysis of this consequence suggests that a contractor may make a windfall on a government contract.

By illustration, assume that a contractor has one government contract that is extended because of additional work, and several commercial contracts or government firm-fixed-price contracts that are performed as scheduled. Now assume the government wants to issue a modification for a minor change (e.g., replace one window with another window style). If *Eichleay* is used to calculate home office overhead recovery on this contract *extension*, then additional home office overhead for that contract period will be added to the cost of the minor change. The overhead cost (or a portion of it) previously factored in to the firm-fixed-price contracts would be absorbed by the one government contract. The net result is additional profit to the contractor through its savings on the other contracts. **A** similar windfall would be realized if the delay was not "sudden or unexpected and the contractor assigned its manpower and equipment to a cost-reimbursement contract that thereby absorbed more overhead over a shorter period of time.

VI. The "Standby" Requirement and Early Completion

In 1993, the Federal Circuit analyzed the preconditions to use the *Eichleay* formula. In *Interstate General Government Contractors v. West*,[66] the Federal Circuit heard a case brought by a contractor claiming entitlement to unabsorbed overhead costs resulting from government-caused delay. This issue was not contested. The court addressed two other issues: the meaning of "standby;" and, entitlement to unabsorbed overhead costs when the contractor finishes *early*.[67]

"Standby" is a term that refers to the order of a contracting

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[65] *C.B.C. **Enterprises,*** 978 F.2d at 673.

[66] 12 F.3d 1053 (Fed. Cir. 1993).

[67] *Id.* at **1055.**

Although the Board applied an incorrect legal test concerning standing by, the Board's ultimate decision denying recovery is affirmable on its second holding, that IGGC, which finished early, completely failed to prove that it incurred any costs for home office overhead that were not absorbed by the payments of direct costs during the original performance.

Id.

officer to a contractor to not perform any more work on a contract. As will be further discussed in the cases that follow, standby is a prerequisite to recovery under *Eichleay*.

Interstate General Government Contractors involved a construction project that was delayed, and when the contractor received its notice to proceed, it took on additional workers to complete the project. As it turned out, the delay period was 136 days and the contractor finished the project thirteen days early.[68]

The Federal Circuit first addressed the issue of "standby" and held that the "test focuses not on the idleness of the contractor's work force . . ., but on suspension of work on the contract."[69] The Federal Circuit repeated the two-part test from *C.B.C. Enterprises, Inc.*, that "*Eichleay* simply requires that overhead be unabsorbed because performance of the contract has been suspended or significantly interrupted and that additional contracts are unavailable during the delay when payment for the suspended contract activity would have supported such overhead."[70]

The Federal Circuit explained that there was no need to demonstrate that the contractor's work force was idle during the period of delay. Rather, the proper focus was the inability to take on additional work because of the uncertainty of the delay period. "Standby combined with an inability to take on additional work are the two prerequisites for application of the *Eichleay* formula."[71] The requirement to "standby" prevents the contractor from mitigating damages.

The Federal Circuit's analysis is easy to follow up to this point. At this juncture, the Federal Circuit concedes that the contractor could *otherwise* recover for meeting the *Eichleuy* requirements.72

Unfortunately for the contractor, the Federal Circuit gives a superficial explanation of why it would not reverse the board. Because the contractor completed performance within the original contract period, the Federal Circuit required the contractor to prove that there was unabsorbed overhead. To do so, the contractor had to

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[68]*Id.* at 1059.

[69]*Id.* at 1057.

[70]*Id.*

[71]*Id.*

[72]*Id.* "Arguably, these findings could satisfy both elements required for application of the *Eichleay* formula. For the reasons set forth below, however, it does not provide a ground for reversal in this case." *Id.*

prove that the delay caused an adverse effect for the entire performance period.[73]

To do this, the Federal Circuit adopted a three-part test that must be met when a contractor completes a contract early. First, the contractor must prove that it intended to complete the contract early. Second, it must prove that it had the capability to do so. Third, it must prove that it actually would have completed early, but for the government's action.[74]

The Federal Circuit did not explain the requirement for the three-part test very well.[75] On first reading, it may appear that the Federal Circuit has taken a step backward in requiring more proof than what *Eichleuy* requires. However, on reflection, the test makes sense in preventing a contractor from receiving double payment on its overhead claim.

If the contractor finishes early on a contract that suffered delay, suspension, or disruption, the contract will absorb its fair share of overhead. The indirect costs are applied against the direct costs associated with the contract. While there may be initial uncertainty as to delay duration, eventually performance resumes and the overhead is absorbed. If the contractor finishes early and already has informed the government of its intention to finish early,

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[73] *Id.*

> IGGC must still prove that despite finishing early it actually incurred compensable unabsorbed overhead costs due to the delay. . . .
>
> To prove unabsorbed overhead, the contractor must show that the government-caused delay disrupted the relationship between the contractor's revenue and its overhead costs. . . . Where a contractor is able to meet the original contract deadline or, as here, to finish early despite a government-caused delay, the originally bargained for time period for absorbing home office overhead through contract performance payments has not been extended. Therefore, in order to show that any portion of the overhead was unabsorbed, such a contractor must prove that the bargained for ratio of performance revenue to fixed overhead costs . . . has been adversely affected by the delay.

Id. (citation omitted)

[74] *Id.* at 1058-59.

[75] The court in ***Interstate General*** cited two other cases as authority for the three-part test for early contract completion. Neither case adequately explains the test. In Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378, the contractor did not finish the contract early, but claimed it could have. Whether it could have or not, is speculative. It did not complete the contract early and could not prove that the government disrupted its work schedule. Elrich Contracting, Inc., GSBCA No. 10936, 93-1 BCA ¶ 23,316, is less helpful than *Frazier-Fleming* Co. In this case, the contractor alleged government-caused delay but was unable to prove it. It also was unable to prove beyond the bid sheet an intent to complete the project early. The court appropriately pointed out that the contractor also must have the ability to complete early. These two cases are are distinguishable from ***Interstate General.*** While the two cases may deal with early completion, only the contractor in ***Interstate General*** actually finished early.

then the delay may adversely impact the contractor. Its ability to finish earlier could be considered similar to a contract extension (only it is in the contract period). It is not able to seek additional or new work during the period of the "extension" and thereby suffers damage. This is because its original bid was based on finishing early.

Another consideration when the contractor remobilizes after government-caused delay is whether the remobilization creates additional expenses for the contractor. The *Eichleay* formula is designed to distribute unabsorbed overhead to delayed contracts. If the expense is attributable to one contract, then it is a cost of that cost objective and must be allocated as such. Thus, if the contractor has additional expenses—such as, hiring additional labor to finish on time—that is a direct cost of that contract. Accordingly, remobilization costs must be allocated only against the delayed contract and not allocated as an indirect cost. Because remobilization costs are recoverable as direct costs, application of the three-part test has no bearing on this issue of recoverability.

VII. *Eichleay:* The Exclusive Formula

In 1994, the Federal Circuit again made significant law in the area of unabsorbed overhead costs. In *Wickham,* a construction case, the Federal Circuit ruled that the *Eichleay* formula was the only proper method of calculating unabsorbed overhead costs.[76]

In *Wickham,* the contractor believed that it was entitled to allocate eighty percent of its overhead to the government contract even though it had two commercial contracts. The contractor claimed that eighty percent of its home office expense was directly attributable to the government contract because its operations were run from the contractor's home office. It claimed the other two contracts could be segregated from the government contract because those contracts had field office overhead. Unmoved by this argument, the Federal Circuit held that the contractor's argument was a non sequitur.[77]

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[76]Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1580 (Fed. Cir. 1994). "When a contractor satisfies the prerequisites for application of the Eichleay formula, that formula is the exclusive means available for calculating unabsorbed overhead to the delayed contract." *Id.* The prerequisites for the use of the *Eichleay* formula are: (1) standby and (2) the inability to take on additional **work.**

[77]*Id.* at 1578.

> Wickham's argument fails for a fundamental reason—Wickham confuses direct and overhead costs. **As** the Board noted, overhead costs benefit and are caused by the business as a whole, not any one project. Thus, overhead costs are never attributable to or caused by any one contract. Wickham's claim to 'directly attributable' home office overhead is a non

Particularly, costs cannot be both directly attributable and indirect overhead expense. This same analysis carried the day in *Capital Electric and Interstate General.*

Since *Wickham,* the question exists as to whether *Eichleay* was intended to be the exclusive formula in all government contracts or just in construction contracts. In *Wickham,* the Federal Circuit held that *Eichleay* was proper for calculating home office overhead when a contractor otherwise met *Eichleay's* criteria.[78] Although *Eichleay* does not apply to construction contracts only, the Federal Circuit held that it was the "exclusive means available for calculating unabsorbed overhead."[79] Unabsorbed overhead refers to overhead that is incurred, though not allocated, during the period of suspension, delay, or disruption, as distinguished from extended overhead.

Although *Wickham* has decreed that *Eichleay* is the proper formula to use, the prerequisites to recovery still must be met. In a *pre-Wickham* case, the board held that to recover under *Eichleay,* there must be proof of damage.[80] This Federal Circuit followed this view in *Daly Construction, Inc. v. Garrett,*[81] and in a *post-Wickham* case, *ECC International Corp.*[82]

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sequitur. If a cost is directly attributable to a contract, then it is a direct cost, not an overhead cost.

Id.

[78]*Id.* at **1583.**

[79]*Id.* at **1580.** See supra note **73.**

[80]Debcon, Inc., ASBCA No. **45050, 93-3** BCA ¶ **25,906,** at **128,861.**

> [I]t is well established that the contractor has the burden of proving that it had, in fact, suffered some damage as a result of the Government delay. Specifically, in applying the Eichleay formula, the contractor must make a prima facie showing that it was required to stand-by and that it was not practical to undertake performance of other work (such as new work or the acceleration of existing work so as to make way for new projects) and thus generate additional direct costs which could absorb the overhead and G&A expense attributable to the period of delay. See, *e.g.,* Oxwell, Inc., ASBCA No. **39768, 90-3** BCA ¶ **23,069,** and Gregory Constructors, Inc., ASBCA No. **35960, 88-34** BCA ¶ **20,934.**

Id.

[81]5 F.3d **520, 522** (Fed. Cir. **1993).** ("[Tlhe Eichleay formula is not applicable unless the contractor reasonably incurred extended overhead costs attributable to the delay.")*Id.*

[82]ECC International Corp., ASBCA No. **39044, 94-2** BCA ¶ **26,639,** at **132,501.** This case involved a manufacturing contract and the board stated that the "ECC has failed to prove that it did not or could not undertake other work during the delay period. Such proof is a prerequisite to recovery on an Eichleay claim." *Id.* While this decision may postdate Wickham, it does not refer to it as authority for considering Eichleay in a manufacturing case. It may not have been aware of Wickham because Wickham was released on **6** January 1994 and ECC International was released on **11** January **1994.**

VIII. Post-Wickham Interpretations

Preventive Maintenance Services, *Inc.*,[83] a case that involved a Naval repair contract, squarely follows the holding in Wickham. The government delayed in delivering government-furnished material (GFM) and the evidence also revealed that the contractor intended to finish the contract early.[84] The board, however, concluded that the contractor had neither the capability nor would have finished early.[85] Applying Interstate General, the board stated "the presumption that overhead is not absorbed when a contractor can establish standby and the inability to take on other work does not apply in cases involving early completion: 'unabsorbtion must be proven via the three-part test.'"[86] The board found that the contractor had been adequately compensated and because it failed to meet the requirements of Interstate General, it was not entitled to any further compensation.87

Entitlement appears to be the recurring issue with most cases reviewed by the courts and boards since Wickham. In Anchor Fabricators, Inc.,[88] the board refused to permit recovery of unab-

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[83]ASBCA No. 41445, 94-3 BCA ¶ 27,115 (involving a repair contract to repair dual fuel generator engines). The board stated:

> The court of appeals recently held that "the Eichleay formula is the exclusive means for compensating a contractor for unabsorbed overhead when it otherwise meets the Eichleay prerequisites." Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). The prerequisites referred to are: "(1) that the contractor be on standby and (2) that the contractor be unable to take on other work." Interstate General Government Contractors v. West, 12 F.3d 1053, 1056 (Fed. Cir. 1993). Or, as the court stated when agreeing with the Board in Daly Construction, Inc. v. Garrett, 5 F.3d 520, 522 (Fed. Cir. 1993): "In order to invoke the Eichleay formula [the contractor] had to show that it was required reasonably to stand by during the period of delay without staff reduction and that it was impractical to take on additional jobs during this period."

Id.

[84]*Id.* at 135,147.

[85]*Id.*

[86]*Id.*

[87]*Id.* at 135,148.

[88]ASBCA No. 42022, 92-2 BCA ¶ 26,659:

> To recover unabsorbed overhead costs by the "Eichleay Formula," a contractor must prove that performance of the contract has been suspended or significantly interrupted and that additional contracts are unavailable during the delay when payment for the suspended contract activity would have supported such overhead . . . when appellant performed many of the claimed "Added Tasks," its Clayton plant director labor cost increased slightly and ovehead rate dropped, and it obtained additional work during periods of delay . . . . There is no evidence . . . respondent delayed, stopped or suspended appellant's performance . . . . Appellant failed to prove any unabsorbed overhead costs under the "Eichleay Formula" or under Allegheny Sportswear Co., ASBCA No. 4163, 58-1 BCA ¶ 1684.

Id. at 132,638.

sorbed overhead under a supply contract using either the *Eichleay* or the *Allegheny* formula. Recently, in *BEI Defense Systems, Co.*,[89] the board denied a motion for summary judgment for failure to prove causation. In *Thomas & Sons Building Contractor, Inc.*,[90] the board held that proof of delay was not sufficient, and that the number of delay days need not be calculated when the contractor has failed to prove damages resulting from delay. The board cited *Wickham*, but only as authority to declare that the case failed for lack of proof.[91] In *Marine Constr: & Dredging, Inc.*,[92] a constructive suspension case, the board found that the contractor was entitled to recover unabsorbed overhead costs for the period that it was in standby status as well as a reasonable period for finishing its business.

In *Torn Shaw, Inc.*,[93] a construction case, the contractor was denied recovery of unabsorbed overhead costs for lack of proof. Citing *Capital Electric*, the board held that "[i]n a claim for unabsorbed overhead, a contractor must show that it could not have taken on

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[89]ASBCA No. 42022, 94-2 88 ASBCA No. 46399, 95-1 BCA ¶ 27,328 (a manufacturing contract for MK 90 rockets), the board stated:

> We have consistently held that application of the Eichleay formula as an appropriate method of approximating the amount of delay damages attributable to unabsorbed overhead is not automatic; its application requires a prima facie showing that appellant, in fact, suffered some damage as the result of the delay. E.g., Industrial Pump & Compressor, Inc., ASBCA No. 35104, 90-1 BCA ¶ 22,359; Ricway, Inc., ASBCA No. 29983, 86-2 BCA BCA 18,841. . . . The burden of showing this is upon appellant:
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> It is well established that the contractor has the burden of proving that it had, in fact, suffered some damage as a result of the Government delay. Specifically, . . . the contractor must make a prima facie showing that it was required to standby and that it was not practical to undertake performance of other work . . . which could absorb the overhead and G&A expense attributable to the period of delay. . . . Debcon, Inc., ASBCA No. 45050, 93-3 BCA ¶ 25,906, at 128,861.

Id. at 136,215

[90]ASBCA No. 43527, 95-1 BCA ¶ 27,336, at 136,236 (construction contract).

[91]*Id.*

[92]ASBCA No. 38412, 95-1 BCA ¶ 27,286.

> [Allthough an actual suspension of work order was never issued, this is immaterial since a constructive suspension has the same effect and consequences as if an actual suspension order had been issued . . . We hold that appellant has established that it was in a standby status during this entire period. . . appellant is entitled to recover reasonable standby costs and underabsorbed and unabsorbed overhead for a reasonable period for winding up its business.

Id. at 136,029.

[93]ASBCA No. 28596, 1995 ASBCA LEXIS 19, at *103 (ASBCA Jan. 18, 1995) (LEXIS, MILTRY library, BOARDS file).

other work during the delay period due to events on the contract in question or due to the impairment of its bonding capacity."[94]

Thus, it seems that the requirement to prove causation is well settled in any action brought by a contractor against the government for recoupment of unabsorbed overhead costs.

Interstate General Government Contractors *v.* West has been cited recently for its explanation of standby, as well as the three-part test for early completion of the contract.[95] In C&C Plumbing & *Heating,*[96] an Air Force construction case, the board held that "the unanticipated, piecemeal release of the work space affected the contractor."[97] It provided the test for recoupment of unabsorbed overhead costs as follows:

> (1) proof of a delay or suspension of contract performance for an uncertain duration which disrupts the contractor's stream of revenue needed to pay its fixed home office overhead costs; and (2) an inability to take on additional work which would provide a substitute stream of revenue to pay for those costs.[98]

The board held that a "contractor does not forfeit its claim simply by keeping its work force occupied."[99] The issue is whether the contractor was able to substitute a new stream of revenue to replace the disrupted one.[100] Thus, it seems that the requirement for an idle work force is not to be taken literally. Rather, if the contractor cannot replace the delayed project with work of similar income, then it is entitled to recover for unabsorbed (or underabsorbed) costs. HEC *Electrical*[101] followed this view. Any work that is

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[94]*Id.* "Based upon our findings, we also have no basis for confidence in the amount claimed by appellant as its total home office expense, the amount which is a crux of the calculation of recoverable home overhead under the Eichleay formula." *Id.* (citations omitted).

[95]12 F.3d 1053, 1058-59 (Fed. Cir. 1993).

[96]ASBCA No. 44270, 94-3 BCA ¶ 27,063.

[97]*Id.* at 134,857.

[98]*Id.*

[99]*Id.* at 134,858.

[100]*Id.* "This record does not show that appellant was able to do so. Hence, we find that appellant is entitled to recover unabsorbed overhead, and that Eichlealy is applicable."*Id.*

[101]HEC Elec. Constr., ASBCA No. 46677, 95-1 BCA ¶ 27,299.

> There are "two prerequisities to application of the Eichleay formula to recover unabsorbed overhead, assuming government-caused and hence compensable delay: (1) that the contractor be on standby and (2) that the contractor be unable to take on other work." [citations omitted] Respondent argues that it is entitled to summary judgment because appellant's interrogatory answers demonstrate that appellant cannot satisfy these elements.

acquired during the delay period should be credited against the unabsorbed overhead costs calculated using the *Eichleay* formula. This would seem consistent with the general duty to mitigate damages.[102]

In addition to *Preventive Maintenance, Single Ply Systems, Inc.*[103] and *Minority Enterprises, Inc.*,[104] have cited *Interstate General* on the issue of early completion of a contract. *Minority Enterprises* was a construction contractor whose appeal was denied for lack of proof. The three-part test was applied when the contractor finished the contract on the agreed completion date. However, because it could not show that its "bargained for ratio" of revenue to overhead was affected by the delay, the board held that it was not entitled to recover.[105]

> We reject this argument as to each of the three categories of interrogatory answers. With respect to the first category, we do not understand that performance of another contract precludes unabsorbed overhead.

Id. at 136,086

[102] E.C. Morris & Son, Inc., ASBCA No. 36706, 91-2 BCA ¶ 23,778, at 119,088:

> A contractor faced with a suspension of work, like all contractors or, for that matter, all parties, has the duty to mitigate dmages. Toward that end, and consistent with prudent management, a contractor is expected to shift its work force to other work or to other contracts, where they exist, and where the transfer can be accomplished in a practicable manner. If such a transfer can be and has been made, the contractor has mitigated damages becuse at least a portion of the otherwise unabsorbed overhead has thereby become allocable to the direct costs resulting from the transferred labor.

[103] *See* ASBCA No. 43148, 94-2 BCA ¶ 26,918, at 134,031, where the board found:

> There is no evidence that the contractor was delayed in its completion of the contract by reason of the asbestos abatement occurring in the summer of 1990 or by any other excusable cause. Indeed, the available evidence suggests the contrary, namely: that the contractor, after December 1990, turned its attention to other on-going projects on the site.
>
> Finally, it must be noted that the primary manifestation of the existence of unabsorbed overhead is a suspension or severe disruption of work such that the contractor is unable to generate, as would be customary, direct costs with which to absorb its undiminished overhead expense. That situation is clearly not present here.

[104] ASBCA No. 45549, 1995 ASBCA LEXIS 27 (ASBCA Jan. 23, 1995), (LEXIS, MILTRY library, BOARDS file).

[105] *Id.* at *61. In this case the board found:

> Where a contractor meets its original contract completion deadline, as here, the period bargained for absorbing home office overhead through contract performance payments has not been extended. The contractor thus can prove disruption only upon showing that its bargained for ratio of performance revenue to fixed overhead cost during the stipulated performance period (not simply the delay period) was adversely affected by the delay. That can only be established by demonstrating that from the outset of the contract the contractor: (1) planned to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the Government's actions. *E.g.*, Interstate General, 12 F.3d at 1058-59.

Just as in Capital *Electric*,[106] uncertainty of the delay period is still a requirement in proving an inability to take on additional work. In *Fa.* Kummerdiener *GmbH &* Co., *KG*,[107] a construction case, the board found that a "stop loss" order created an uncertainty for the contractor.[108]

Mech-Con Corp.[109] yielded a different result for the contractor. In this construction case, the contractor was told that there were some problems at the job site and was released. While the board found government delay and uncertainty as to when performance would begin, the contractor was not required to remain ready to perform.[110] In other words, the contractor was not required to have an idle work force stand-by.

On the issue of uncertainty, the aforementioned cases have been consistent. To recover for unabsorbed overhead costs, the contractor must show more than that the government-caused delay. It also must show that the delay has an element of uncertainty to it that prevented the contractor from performing other work. Every contract contains the duty to mitigate damages. Accordingly, when, due to uncertainty, a contractor is prevented from attempting mitigation, it may recover.

The Eichleuy formula is not reserved exclusively for government contracts. In a recent case involving two private contractors, Aircraft Gear Corp. *v. Kaman* Aerospace *Corp.*,[111] the Eichleuy formula was used to determine the amount of unabsorbed overhead that a prime contractor was entitled to recoup from its subcontractor on a Navy contract. The subcontractor sued seeking damages and the prime contractor counterclaimed for delay caused by the subcontractor.112

The court found in favor of the defendant, the prime contractor, on its counterclaim. The contractor was unable to timely assemble and deliver helicopters to the Navy. Although the court used the Eichleuy formula, it did not find it to be the exclusive formula as the

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[106]Capital Elec. Co. v. United States, 729 F.2d 743, 745 (Fed. Cir. 1984).

[107]ASBCA No. 54248, 94-3 BCA ¶ 27,197, at 135,553. The government caused the contractor delay by initiating a personnel "stop loss" order. The order disrupted the contractor's ability to refinish floors in post housing because it changed the date to return from overseas for the army troops from 1990 to 1997.

[108]*Id.* at 135,554.

[109]ASBCA No. 45105, 94-3 BCA ¶ 27,252.

[110]*Id.* at 135,784.

[111]No. 93 C 1220, 1995 U.S. Dist. LEXIS 1301, at *35 (E.D. Ill. Feb. 1, 1995) (LEXIS, PUBCON library, CTSBCA file).

[112]*Id.* at *16.

Federal Circuit had held in *Wickham*. However, the court adopted the "standby" requirement of *Interstate General*.[113] This case also had the requisite element of uncertainty[114] that prevented the contractor from taking on additional work.

Not all cases have used *Wickham* as authority for applying *Eichleay*. Furthermore, not all cases since *Wickham* have used the *Eichleay* formula.

In *Daly Construction,*[115] a case decided only four months before *Wickham,* the Federal Circuit found that *Eichleay* did not apply, despite **518** days of government-caused delay. The Federal Circuit held that if the contractor had based its recovery on another formula besides *Eichleay* it could recover. At first glance, this appears to be a harsh result for the contractor. However, the contractor failed to present evidence that it was forced to stand by.[116] The Federal Circuit did not elaborate on what other formulas (e.g., *Carteret or Allegheny)* that it would accept besides *Eichleay*.

IX. The Jury Verdict Method

In the absence of an applicable formula, courts and boards have used the jury verdict method. In two recent cases, the board used the jury verdict method to compute costs, used when a contractor has suffered some injury that is not susceptible to precise quantification. For example, it is used when the contractor has suffered a labor inefficiency due to government action.[117] According to Professor Nash, often "actual cost data will be available to demonstrate the rate of productivity, but estimates of such costs have also been accepted if they are corroborated."[118] However, because it is

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[113]*Id.* at *37. As for the "standby" requirement, Interstate General Government Contractors v. West, 12 F.3d at 1053, 1057 (Fed. Cir. 1993), explains that "Properly understood, the 'standby' test focuses not on the idleness of the contractor's work force (either assigned to the contract or total work force), but on suspension of work on the contract. *Id.* n.20. Furthermore, "If the inquiry were otherwise, a contractor would be penalized for having mitigated its damages for direct costs by reassigning its employees to other jobs during the delay." *Id.* at 1057 n.4.

[114]*Aircraft Gear Corp.,* *No.* 93 C 1220, 1995 U.S. Dist. LEXIS 1301, at *42.

> Kaman was unable to preserve and set aside the partially completed aircraft and fully reassign or furlough its workers because Aircraft Gear continually reassured Kaman that gearbox kits would be forthcoming in the immediate future. As a result of these assurances, Kaman remained in a constant state of readiness to proceed but was always uncertain about the gearbox delivery schedule.

Id.

[115]Daly Constr., Inc. v. Garrett, *5* F.3d 520, 522 (Fed. Cir. 1993).

[116]Daly Constr., ASBCA No. 34322, 91-1 BCA ¶ 24,469, at 122,045.

[117]*See* NASH, *supra* note 33, 17-22 to -24 (1989).

[118]*Id.*

concerned with inefficiency, the jury verdict has limited application. In other words, the government has caused a disruption in the contractor's normal production routine. Perhaps this would have been an acceptable alternative if proposed in the Daly appeal.

In Henry Angelo & Co.,[119] a pre-Wickham case, the board used a jury verdict method to compute unabsorbed overhead. This was a requirements contract to paint the family housing units at Fort Sill, Oklahoma. The board determined the appropriate amount using the contractor's direct field office overhead costs.[120]

In another post-Wickham case, Western Alaska Contractors, *J.V.*,[121] the board used the jury verdict method to award the contractor, Western Alaska, $1.3 million. The board found that where there are no other contracts, the Eichleay formula is inappropriate.[122] In this construction case, Western Alaska was awarded two contracts: one was to repair the airfield pavements; the other was to pave parking lots at Shemya Air Force Base, Alaska. The contract season was the summer of 1991.[123]

Transportation to this remote island base was at government expense. The contractor arrived on the barge known as the Spring Cool Barge. Western Alaska demobilized for the return to Seattle, Washington, only to learn the Air Force would not send the Fall Cool Barge. Western Alaska spent the winter of 1991 at Shemya.[124] Unfortunately, it also spent the following summer there because the Air Force failed to properly manifest its machinery for the return trip. When the 1992 Spring Cool Barge arrived, the transportation officer refused to ship Western Alaska's property. This was the only equipment that Western Alaska owned and it was unable to take on any other contracts while marooned at Shemya. It attempted to mitigate its losses by renting some of its equipment to other contractors and then filed its claim for damages when it arrived in Seattle on the 1992 Fall Cool Barge.[125]

The government argued that Western Alaska should have privately contracted for a return barge. The board held "[i]t was the

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[119]ASBCA No. 43669, 94-1 BCA ¶ 26,484, at 131,825. "The use of a 'jury verdict' technique is appropriate where we have sufficient evidence to permit us to arrive at a fair and reasonable approximation of the damages. Schuster Engineering, Inc., ASBCA No. 28760, 87-3 BCA ¶ 20,105." *Id.*

[120]*Id.* at 131,825.

[121]ASBCA No. 46033, 1994 ASBCA LEXIS 391, at *46, "47 (ASBCA Dec. 30, 1994; as corrected Feb. 2, 1995)(LEXIS, MILTRY library, BOARDS file).

[122]*Id.* at *46.

[123]*Id.* at *3.

[124]*Id.* at *5.

[125]*Id.* at *11-17.

Government which caused the problem. It cannot now dictate how the other party should have responded."[126] The board considered and rejected the *Eichleay* formula because it applies where overhead is allocated among several contracts. "Since appellant had no other contracts during the period, *Eichleay* is inappropriate under the facts in this appeal.[127]

This case shows that *Eichleay* is not appropriate in every instance. Does this 'mean that the board ignored the holding in *Wickham?* I do not believe so. Recall the court decreed *Eichleay* to be the only proper formula when it otherwise meets the *Eichleay* prerequisites.[128] A literal application of the *Eichleay* formula when there is only one contract will result in no recovery for unabsorbed overhead.

Wickham applied the *Eichleay* formula to a construction contract when it decreed it the only proper method for recovery of unabsorbed overhead costs. A review of the cases decided since *Wickham* indicate that it also has been followed in manufacturing and repair cases.[129]

X. Conclusion

The government has come a long way since *McCord.* Fifty years ago, in *Fred R. Comb,* the board declared that overhead was payable to a contractor for the breach of contract caused by government delay. Since then, boards have considered a variety of formulas in paying contractors for unabsorbed overhead.

The board adopted the formula proposed by the Eichleay Corporation in 1960. Since then, the *Eichleay* formula has been the most popular method of computing unabsorbed overhead costs. It was not until 1994 that the Federal Circuit declared in *Wickham,* that *Eichleay* is the only proper method for computing unabsorbed overhead costs. It restricted its decree to those cases that meet the *Eichleay* prerequisites.

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[126] *Id.* at *40.

[127] *Id.* at *46.

[128] Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1581 (Fed. Cir. 1994).

[129] Aircraft Gear Corp. v. Kaman Aerospace Corp., No. 93 C 1220, (E.D. Ill., February 1, 1995) (LEXIS, PUBCON Library, CTSBCA File); BEI Defense Systems Co., ASBCA No. 46399, 95-1 ¶ 27,328; HEC Electrical Constr., ASBCA No. 46677, 95-1 ¶ 27,299 (FFP contract to upgrade a fuel distribution system; government motion for summary judgment denied; Eichleay formula available for unabsorbed extended overhead); Preventive Maintenance Services, Inc., ASBCA No. 41445, 94-3 BCA; ¶ 27,115.

The prerequisites include: (1) uncertainty in the delay period that requires the contractor to "stand by" and (2) the inability to take on additional work. This last requirement is tempered by the requirement to mitigate damages. This has been determined to mean that while a contractor may be required to stand by and prove this, it still may recover unabsorbed overhead costs if it can prove the work it performed during the delay period did not replace the same revenue stream that is delayed.

In *Wickham*, the court breathed new life into the use of the *Eichleay* formula.[130] It appears that its use in government contracts is preferred, regardless of the type of contract. It also appears that the courts and boards do not feel tied to its use in those situations where *Eichleay* would not otherwise apply.

This article is intended to provide the contract law attorney confronted with an unabsorbed overhead cost issue a solid foundation from which to advise a client. From the seminal case, *Fred R. Comb*, the entitlement to unabsorbed overhead costs was born. After entitlement came a need to develop a formula for quantifying unabsorbed overhead costs and the *Eichleay* formula was created. In 1994, the *Wickham* court declared that the *Eichleay* formula was the exclusive formula to determine unabsorbed overhead costs in cases like *Eichleay*. Finally, the article has examined the most recent cases on the subject.

> "Men must be taught as if you taught them not,
> And things unknown proposed as things forgot."
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> - Alexander Pope

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[130] Contract **Law** Note, *The Eichleay Formula-Struggling to Survive*, ARMY LAW., Dec. **1993,** at **46.**

THE BATTLE OF THE GENERALS: THE UNTOLD STORY OF THE FALAISE POCKET*

REVIEWED BY LIEUTENANT COLONEL DAVID M. CRANE**

Four things come not back: the spoken word; the sped arrow; time past; the neglected opportunity
–Omar Ibn Al-Halif[1]

As we approach the twenty-first century, the United States Armed Forces will continue to conduct military operations with other nations. Other than in self defense, unilateral operations by a nation will be a thing of the past. A nation will deploy its forces under United Nations auspices through the United Nations Security Council, and these deployments will involve several member states.

The United States Army has made coalition warfare a key aspect of its operations. *Field Manual* 100-5, *Operations,* highlights that the United States often will accomplish its national security strategy through coalitions and alliances.2 Under the collective security theme of the United Nations Charter, nations of the world will unite to maintain international peace and security.3

Throughout history, nations have joined together to face a common threat to their security. The United States turned to France for assistance in gaining its independence. In turn, the United States

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*MARTIN BLUMENSON, THE BATTLE OF THE GENERALS: THE UNTOLD STORY OF THE FALAISE POCKET (William Morrow, New York 1993); 288 pages, $14.00 (soft cover).

**Judge Advocate General's School, United States Army. Currently assigned as Chairman, International and Operational Law Department, The Judge Advocate General's School, Charlottesville, Virginia.

[1]Horace (Quintus Horatius Flaccus 65-8 B.C.), *Odes,* bk. 1, *in* BARTLETT'S FAMILIAR QUOTATIONS (Justin Kaplan, ed., 16th ed. 1992).

[2]DEP'T OF *ARMY,* FIELD MANUAL 100-5, OPERATIONS, ch. 5 (June 1993) [hereinafter FM 100-51. The United States Army calls these operations "combined operations." In Chapter Five, combined operations come in two aspects, alliances and coalitions. **An** *alliance* is defined as "[a] relationship [that] is longstanding and formalized by mutual political, diplomatic, and military agreements," while a *coalition* is a relationship that "is short term, ad hoc, and less formal." *Id.*

At the United States Army John F. Kennedy Special Warfare Center at Fort Bragg, North Carolina, special operations doctrine call operations that involve coalition partners in military operations other than war (MOOTW) and military operations with unfamiliar forces (MOWUF). *See generally* Robert D. Lewis, *SOF Planning for Coalition Operations,* SPECIAL WARFARE, 1994, at 28.

[3]The Preamble to the Charter of the United Nations states: "to unite our strength to maintain international peace and security."

assisted France and Great Britain in World War I in defeating aggressive German actions in France. In Korea, the United Nations for the first time faced down aggression by the communists of North Korea. More recently, in Operation Desert Shield/Storm, the United States joined thirty-six nations in stemming Iraqi moves on Kuwait.[4]

An excellent historical study of coalition warfare is Martin Blumenson's book on the battle that "should have won World War II," *The Battle of the General's, The Untold Story of the Falaise Pocket.* Martin Blumenson is a respected scholar and teacher who has authored fifteen books, to include *The Patton Papers.* His most recent book is easily read and fast paced, underscoring an important theme in any coalition operation — unity of command and implicitly, mutual trust. *Field Manual 100-5* considers these the key to any successful coalition and so does Professor Blumenson.[5]

In his book, Professor Blumenson shows how in the summer of 1944 confused command relationships and a lack of mutual trust among the senior Allied commanders hampered, and even caused, the Allies to fail in capturing the bulk of the German forces defending against the Allied landings at Normandy.

The Falaise Pocket, as it has come to be known, was created by the breakout of United States forces south of the beach landing zones near St-Lo, France.[6] General Patton's Third Army, under General Omar Bradley's 12th Army Group, dashed eastward, flanking the German Seventh and Fifth Panzer Armies.[7] Simultaneously, the Second British and First Canadian Armies, under General Montgomery's 21st Army Group, attacked south in what appears to have been a well coordinated pincer movement to trap the German forces.[8] In reality, it was a disjointed and largely uncoordinated effort which caught the Germans off guard because of overwhelming Allied air superiority and speed of massed United States forces to the south.[9]

Professor Blumenson's book follows the events that led up to the creation of the Falaise Pocket and the Allies' attempts to close it in early August of 1944. The book examines the command structure and relationships between the various Allied command headquarters. Professor Blumenson also highlights the personal relation-

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[4]FM 100-5, *supra* note 2, at 5-1.

[5]*Field Manual 100-5* states that mutual trust binds the combined force together. *See id.* at 5-3.

[6]*See generally* GERHARD L. WEINBERG, A WORLD AT ARMS 694 (1994).

[7]*See generally* JOHN KEEGAN, THE SECOND WORLD WAR 405 (1989).

[8]*Id.* at 408-09.

[9]*Id.* at 409-10. *See also* WEINBERG, *supra* note 6, at 694.

ships between the Supreme Allied Commander Dwight D. Eisenhower and his field commanders, Generals Bernard Montgomery and Omar Bradley.

This senior command relationship was hampered by the ego of Montgomery and the insecurity of Bradley, coupled with the apparent lack of involvement in the campaign by Eisenhower.[10] The personality and philosophical struggles of these leaders during the Normandy campaign would continue throughout the rest of the war in western Europe. Professor Blumenson asserts that, although unified in effort, the personality conflicts built a sense of mistrust between the Americans and British commanders which lengthened the war.

In his last chapter, Professor Blumenson concludes that General Bradley's inconsistent behavior during the battle caused United States forces to execute the envelopment too slowly, allowing the German forces to escape to fight again.[11] Only General Patton receives praise for his actions in his unsuccessful attempts at trying to persuade a hesitant Bradley to allow him to sweep far to the east and trap all of the German forces west of the Seine River short of Paris. The author declares that only Patton had grasped what needed to be done—to destroy the bulk of German forces in France.[12]

This book is important for any professional soldier to read and ponder the inherent strengths, as well as weaknesses, of any coalition operation. It is an excellent contrast with a study of the coalition operation of Desert Shield/Storm. *The Battle of the Generals*

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[10]BLUMENSON, supra note *, at 263-72.

[11]Gerhard L. Weinberg states as follows:

> It is possible that if Bradley had ordered the 3rd Army to drive beyond its designated advance line to Falaise, the pocket could have been sealed off earlier and more effectively; but in the absence of regular meetings between Montgomery and the American commanders (because of Montgomery's unwillingness to have such meetings), such a step would have been difficult to take.

WEINBERG, *supra* note 6, at **694.**

[12]BLUMENSON, *supra* note *, at 271.

highlights the need for unity of command and mutual trust among coalition partners in order for a combined military operation to succeed. Raymond Callahan states that the final closing of the Falaise Pocket on August 19, **1944** was an imperfect Allied victory.[13]

[13] *Id.* at 272. Many of the units that fought in the Normandy campaign and who escaped from the pocket took part in the German counter-offensive known as the Battle of the Bulge in the Ardennes a few months later in December of 1944.

John Keegan cites in his book, ***The*** *Second World War,* the impact that the Normandy campaign, up to the closing of the Falaise Pocket, had on the German forces:

> The Hitler Youth Division's success in holding open the neck of Falaise pocket until 21 August allowed some 300,000 soldiers to escape and, more surprisingly, 25,000 vehicles to cross floating bridges and ferries operated by German engineers under cover of darkness between 19 and 29 August. Behind them, however, the fugitives left 200,000 prisoners, 50,000 dead and the wreck of two armies' equipment. Over 1300 tanks were lost in Normandy, of the Panzer divisions which escaped in some semblance of order none brought more than fifteen tanks out the holocaust. Two Panzer divisions, Lehr and 9th, existed only in name; fifteen of the fifty-six infantry divisions which had fought west of the Seine had disappeared altogether.

KEEGAN, *supra* note 7, at 410.

THE LINDBERGH CASE*

REVIEWED BY ANTHONY R. TEMPESTA**

The kidnapping and murder of the Lindbergh baby attracted world-wide attention and was dubbed "the crime of the century." Jim Fisher's book, *The Lindbergh Case*, examines the crime in painstaking detail, beginning in the hours prior to the kidnapping through the criminal investigation that produced a suspect, Bruno Richard Hauptmann, and ending with his trial, conviction, and execution. Fisher, an ex-FBI agent who teaches criminal justice at Edinboro University in Pennsylvania, presents the material in a skillful and logical manner. *The Lindbergh Case* is relevant because it addresses proponents of historical revisionism who have gained credibility in recent books arguing for Bruno Hauptmann's innocence.

Every parent's nightmare occurred at the Lindbergh home on March 1, 1932. Twenty-month old Charles Augustus Lindbergh, Jr., son of the world-famous aviator Colonel Charles A. Lindbergh and poet Anne Morrow Lindbergh, was snatched from his crib sometime between 7:30 and 10:00 p.m. The kidnapper gained access to the second-story nursery through the window using a crude homemade ladder and disappeared into the New Jersey night. Colonel Lindbergh was contacted by the kidnapper through a series of hand-written ransom notes, which demanded a $50,000 payment for the safe return of the child. Colonel Lindbergh paid the ransom, but the kidnapper vanished without producing the child.

Intense police investigations turned up nothing. Colonel Lindbergh followed numerous false leads, from respectable citizens to members of the underworld. He went to sea and took to the air in search of his son. But it was all for naught. On May 12, 1932, a truck driver stumbled on the child's body in a shallow grave in woods located less than two miles from the Lindbergh home. The Lindbergh baby had been dead all along, killed by a blow to the back of the head.

The case probably never would have been solved were it not for a fact totally unrelated to the crime. In response to gold hoarding, which had become popular during the Depression as a hedge

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* JIM FISHER, THE LINDBERGH CASE (Rutgers University Press, 1994); 480 pages, $17.95 (soft cover).

**Judge Advocate General's Corps, Captain, United States Army Reserve. Currently serving as a Department of the Army civilian attorney as Chief, Legal Assistance Division, United States Army Southern European Task Force, Vicenza, Italy.

against inflation, the United States was moving off the gold standard. All currency known as "gold certificates" would soon become obsolete. These dollar bills, distinctive because of their yellow seal, were intentionally included in the ransom payment. Appearing sparingly at first, the ransom bills were later spent with greater frequency and eventually led to the arrest of Bruno Hauptmann on September 19, 1934.

After a spectacular trial which received world-wide press coverage, Hauptmann was convicted of first-degree murder on February 13, 1935, and sentenced to death. In an effort to make political gain from the situation, New Jersey Governor Harold G. Hoffman granted a delay in the execution and attempted to persuade Hauptmann to confess. The enraged New Jersey electorate turned against Hoffman, who after considerable waffling, withdrew from further involvement in the case. With his appeals exhausted, Hauptmann was put to death in the electric chair at Trenton State Prison on April 3, 1936.

Rather than approach the case in piecemeal fashion as the revisionists do, Fisher weaves the threads of evidence together until they form an unbreakable chain of guilt. The three linchpins of Hauptmann's guilt are: the ladder; the ransom notes; and the ransom money.

Although crudely constructed, the ladder was ingenious in design. It was formed by three interlocking sections which, when disassembled, easily could fit in the rear seat of a car. Hauptmann was a carpenter who possessed the skills necessary to build such a ladder. A sketch in one of Hauptmann's notebooks matched the ladder's construction. One of the rungs in the ladder, although shortened and planed, was found to have come from Hauptmann's attic, as matched by the nail holes in the board which corresponded exactly with nail holes in the floor joist.

Concerning the ransom notes, several handwriting experts testified that the style of penmanship and particular misspellings of words indicated the author was schooled in Europe, most likely Germany. Hauptmann was German. Samples of Hauptmann's handwriting, complete with misspelled words, were consistent with writing samples made before and after the kidnapping.

Some of the ransom money had been spent, and several witnesses testified that Hauptmann had passed many of those bills. More than $14,000 of ransom money was discovered hidden in Hauptmann's garage. After Hauptmann was placed into custody, no further ransom money appeared. When pieced together with expen-

ditures known or alleged to have been made by Hauptmann, almost all of the $50,000 ransom payment could be accounted for.

Further circumstantial evidence points to Hauptmann's guilt. Hauptmann, who denied making the ladder and climbing into the Lindbergh's second-story window, was convicted in Germany of breaking into the Mayor's home by using a ladder and climbing in through a second-story window. Hauptmann, a miserly man who once kept a log of every penny spent in his household, made several large purchases immediately after the ransom payment. He also quit his job as a carpenter at that time and invested $25,000 in the stock market.

Hauptmann also made several inconsistent and implausible statements. He said that he was working at a location in New York during the days just before and shortly after the kidnapping, but testimony from the employer refuted that claim. His alibi claim was supported mainly by his wife. Hauptmann said that he had been asked by a friend, Isidor Fisch, to keep a shoebox for him while Fisch returned to Germany. Hauptmann eventually opened the shoebox and found the Lindbergh ransom money. Because Fisch had owed him money from a business deal which had gone bad, Hauptmann took some of the money to repay the debt and hid the rest. No one could corroborate this story, to include Fisch who had died in Germany in abject poverty.

Revisionists point to several items in their attempt to cast doubt on the Hauptmann conviction. There were no witnesses to the crime itself. Evidence pointed to an "insidejob," and a maid committed suicide after making inconsistent statements to the police. There were no fingerprints at the crime scene. The body found in the woods was thirty-three inches long, but the Lindbergh baby had been measured at twenty-nine inches just prior to the kidnapping. Despite intense police interrogations and an eleventh-hour intervention by Governor Hoffman, Hauptmann never confessed.

Fisher refutes these arguments point by point. Although no one saw Hauptmann at the Lindbergh home on the evening of the kidnapping, several witnesses placed him near the scene a few days prior. The maid who committed suicide was ill and suffering from depression, and likely feared her sexual indiscretions would cause termination by her conservative employers. The lack of fingerprints indicated that the kidnapper wore gloves. The length of the child, twenty-nine inches, was a typographical error; it should have read, **"2** feet, **9** inches," which totals thirty-three inches. Finally, Fisher interviewed a police investigator who stated that Hauptmann broached the subject of confession only to back away when it appeared that a confession would not guarantee leniency.

The revisionists also attack Hauptmann's conviction by attacking the credibility and motivation of government witnesses, alleging unsubstantiated conspiracy theories, and vehemently proclaiming Hauptmann's innocence. Yet all of these efforts were made during Hauptmann's trial, and the jury still chose to find him guilty beyond a reasonable doubt. Admittedly, the police made some mistakes during the investigation—such as the failure to take a plaster cast of a footprint found next to where the ladder stood. Despite these errors being raised at trial, however, they failed to overcome the three major indicia of guilt.

If nothing else, *The Lindbergh Case* hearkens back to an era that may be lost forever. In a display of judicial economy unlikely to be matched today, Hauptmann's fully contested first-degree murder trial, consisting of 162 witnesses, 381 exhibits, and approximately 1,600,000 spoken words, took a mere thirty-two days. For that alone, *The Lindbergh Case* can be recommended as an example of the "good old days" of American jurisprudence.

MILITARY EVIDENTIARY FOUNDATIONS*

REVIEWED BY MAJOR PATRICK D. O'HARE**

Perhaps the most important thing that supervisors and trainers of trial attorneys can do is to provide inexperienced counsel with the means to help themselves. The market offers a plethora of publications that purport, in general or more specific terms, to assist the advocate. An example of the former is the *Dial Notebook,*[1] a collection of very readable articles originally published in *Litigation* magazine. The materials are arranged in the approximate sequence of a trial, proceeding from Trial Preparation (Chapter I) through Final Argument (Chapter IX) and beyond. If *Dial Notebook* and books like it have a vice, it is one which is implicit in the inclusive nature of the text—generally, but not absolutely, the text is superficial in its treatment of certain areas. Other publications have a more focused objective which permits them to deal completely with a topic. Among those books is the subject of this review, *Military Evidentiary Foundations.*

The law of evidence is the language of litigation. To be as effective as possible in court, an advocate needs a thorough grounding in the content of the evidentiary rules, and the practical methodologies of applying them. Both elements are necessary. For example, understanding the text of Military Rule of Evidence 803(6), "Records of Regularly Conducted Activity" (the so-called "business records" exception to the rule against hearsay), does not necessarily enable an advocate to lay the foundation to offer a laboratory report into evidence at a court-martial. An understanding of the Military Rules of Evidence may come from private study, but the process of successfully offering evidence for consideration by a court generally requires practice and experience, or some reasonable substitute for such experience. *Military Evidentiary Foundations* provides such a substitute.

The authors of *Military Evidentiary Foundations* are well-known authorities who have significant practical and academic

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*DAVID A. SCHLEUTER, STEPHEN A. SALTZBURG, LEE D. SCHINASI, EDWARD M. IMWINKELRIED, MILITARY EVIDENTIARY FOUNDATIONS (Charlottesville, Virginia; The Michie Company, 1994); 440 pages, $65.00 (hardcover).

**The Judge Advocate General's Corps, United States Army. Written while serving as Professor, Criminal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] JAMES W. MCELHANEY, TRIAL NOTEBOOK (American Bar Association, 3d ed. 1994).

experience with the Military and Federal Rules of Evidence. Professor Imwinkelried is one of the most prolific evidentiary commentators in the country, and is a former Army judge advocate. In the preface to *Military Evidentiary Foundations,* he notes that his well-known *Evidentiary Foundations*[2] text was inspired by the appendices to *Army Pamphlet* 27-10: *Military Justice Handbook—The Trial Counsel and Defense Counsel.* Professor Saltzburg, Professor Schleuter, and Colonel Schinasi are coauthors of *Military Rules of Evidence Manual,* an invaluable guide to the Military Rules of Evidence. Moreover, Professor Schleuter is the author of *Military Criminal Justice: Practice and Procedure,* and Professor Saltzburg is the coauthor of *Federal Rules of Evidence Manual.*

Most sections in the book begin with a brief and practical discussion of the applicable evidentiary doctrine. Next, the authors enumerate and identify the elements of the foundation. Finally, and most importantly, the authors provide a sample foundation in which they correlate the proponent's questions to the previously identified elements. For example, in discussing doctrine concerning the use of models as demonstrative evidence, the authors briefly discuss some of the pitfalls and benefits of using models as evidence. Next they identify the five distinct elements required in the foundation for a model. Finally, they create a hypothetical scenario calling for the use of a model, and thereafter present a sample foundation which embodies the required foundational elements. After studying that section of the book, the reader is ready to discuss the use and need for a model, and to lay the foundation for its admission at trial. That paradigm is repeated in more than a hundred different evidentiary scenarios, ranging from proving a chain of custody to the use of extrinsic evidence of a prior inconsistent statement.

The authors have organized *Military Evidentiary Foundations* into twelve chapters. Within the broad topical headings identified below, the authors treat an enormous array of discrete evidentiary issues in both a simple and a comprehensive manner. While the book is not a text on evidence, the methodology employed imparts to the advocate not only the mechanical "how" of evidentiary foundations, but the analytical "why" of those foundations as well.

Chapter One includes a discussion of the mechanics of introducing evidence at a court-martial. Inexperienced advocates will benefit particularly from the itemized, four-step process for handling exhibits. Chapter Two principally concerns procedures used when evidence is excluded, or when the military judge sustains an objection by the opponent. This chapter is of particular utility to the

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[2] EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (3d ed. 1995)

defense practitioner because it addresses the critical issue of preserving error. Chapter Three concerns the competency of witnesses, a doctrine that may prevent a person from giving testimony under certain circumstances. This chapter includes illustrative examples of the voir dire of a child, demonstration of personal knowledge by the proponent of a lay witness, and presentation of psychiatric testimony attacking a prospective witness.

While the first three chapters are important and illuminating for the inexperienced advocate, the great utility of the book lies in Chapters Four through Eleven, and it is to those sections that both inexperienced and experienced courts-martial practitioners may turn in moments of need. Chapter Four, "Authentication, Identification, and Verification of Evidence," addresses the process of proving that the evidence is what the proponent claims it to be, discussing the authentication of private, business, and official writings, oral statements, and audio or video recordings. It also delineates the requirements associated with identifying real or original evidence, including the foundational requirements for a chain of custody.

Chapter Five addresses "Credibility Evidence,'' and includes distinct scenarios pertaining to the stages of the credibility analysis: bolstering, impeachment, and rehabilitation. While there is useful discussion of permissible bolstering (i.e., prior identification and "fresh complaint") and rehabilitation (i.e., prior consistent statements and the character trait of truthfulness), the majority of this chapter concerns impeachment. The book contains fully developed examples of virtually every method of impeachment that an advocate is likely to use. Chapter Six concerns "Character, Habit, and Other Acts Evidence," including the important topic of uncharged misconduct.

Chapter Seven discusses "Privileges and Similar Rules of Exclusion." The authors provide a useful analysis of all privileges based on the proceedings to which privileges apply, the intended holder of the privilege, the nature of the privilege, the nature of privileged information, waiver of privileges, and exceptions to privileges. Among the other "exclusionary rules" discussed in this chapter, the most important probably is the prohibition against using statements made during plea bargaining.

Chapter Eight concerns "The Original Writing 'Best Evidence' Rule." Sensibly, the authors organize the chapter around the defeat of a "best evidence" objection. That organization implicates all of the traditional issues associated with original writings: for example, whether the document is a "writing";whether the terms of the writ-

ing are "in issue"; whether the writing is a "duplicate''; excuses for nonproduction.

Chapter Nine comprehensively discusses "Opinion Evidence" by lay and expert witnesses, with an understandable emphasis on experts. Of particular utility are the sections dealing with the basis of the expert's opinion. They include the handling of an opinion based on hearsay reports and eliciting an opinion based on a hypothetical question. With the liberal provisions in the Military Rules of Evidence concerning admission of expert testimony, the importance of effectively developing such testimony for trial cannot be overstated.

Chapter Ten concerns "The Hearsay Rule and Its Exemptions." The authors provide a step-by-step definition of hearsay which includes not only verbal or written expressions, but nonverbal conduct amounting to a "statement." Chapter Eleven addresses "Exceptions to the Hearsay Rule." As any experienced advocate knows, there are numerous exceptions to the hearsay rule. Not all of the exceptions are of equal importance, however, and Chapter Eleven contains those exceptions routinely required by the advocate. A separate section in Chapter Eleven addresses the complicated and important issue of residual hearsay exceptions based on a showing of reliability and necessity.

In Chapter Twelve, the authors address substitutes for evidence, such as stipulations and judicial notice. The book also includes a fifty-three page appendix containing the complete Military Rules of Evidence, although the appendix does not include the Drafter's Analysis of the Rules. The book can be updated with pocket part supplements. The index is almost twenty pages long and is easy to use.

Predictably, in concept and form, this book owes much to Professor Imwinkelried's *Evidentiary Foundations,* now in its third edition, but there are enough differences between the texts to make *Military Evidentiary Foundations* worth the difference in cost. *Military Evidentiary Foundations* is entirely oriented toward court-martial practice. The numerous practical examples of foundational requirements are formatted in the context of a court-martial conducted under the military rules of evidence, and written with an eye turned exclusively and comprehensively toward the textual and interpretive requirements of those rules. For example, if an advocate needs to determine precisely how to impeach a witness with inconsistent statements made at a Uniform Code of Military Justice Article **32** proceeding, he or she can turn to section 5-10(F) to review the elements of the foundation and the accompanying sample.

While the book is of greatest help to the court-martial practitioner, civil litigators also could benefit from it.

Military Evidentiary Foundations is above all a practical and useful text. Anyone can read and generally understand the rules of evidence, but that knowledge, without more, does not prepare the advocate on how to ***use*** those rules. This book greatly assists in that extremely important task. It is meant to identify and delineate all the evidentiary foundational requirements which may arise in the course of a court-martial, and it succeeds in its task.

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2. Include in items 10 and 11, in cases where the stockholder or security holder is a trustee, the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check box. Use blank sheets if more space is required.
3. Be sure to furnish all information called for in item 15, regarding circulation. Free circulation must be shown in items 15d, e, and f.
4. If the publication had second-class authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or the first printed issue after October, if the publication is not published during October.
5. In item 16, indicate date of the issue in which this Statement of Ownership will be printed.
6. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of second-class authorization.

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:

JOEL B. HUDSON
Acting Administrative Assistant to the
Secretary of the Army
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